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A cumulative list of the parts affected this month can be found in the Reader Aids section at the end of this issue.

Federal Register
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Presidential Documents

Title 3—

The President

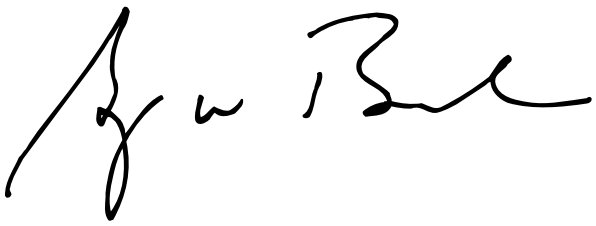
Presidential Determination No. 2005–13 of December 14, 2004

Waiver of Restrictions on Assistance to the Republic of Uzbekistan under the Cooperative Threat Reduction Act of 1993 and Title V of the FREEDOM Support Act

Memorandum for the Secretary of State

Consistent with the authority vested in me by section 1306 of the National Defense Authorization Act for Fiscal Year 2003 (Public Law 107–314), I hereby certify that waiving the restrictions contained in subsection (d) of section 1203 of the Cooperative Threat Reduction Act of 1993 (22 U.S.C. 5952), as amended, and the requirements contained in section 502 of the FREEDOM Support Act (22 U.S.C. 5852) during Fiscal Year 2005 with respect to the Republic of Uzbekistan is important to the national security interests of the United States.

You are authorized and directed to transmit to the Congress this certification and the associated report (including its classified annex) that has been prepared by my Administration consistent with section 1306(b) of Public Law 107–314. You are further authorized and directed to arrange for the publication of this certification in the **Federal Register**.



THE WHITE HOUSE,
Washington, December 14, 2004.

[FR Doc. 04–28747
Filed 12–30–04; 8:45 am]
Billing code 4710–10–P

Federal Register

Monday,
January 3, 2005

Part II

Department of Transportation

Federal Railroad Administration

49 CFR Part 224

Reflectorization of Rail Freight Rolling Stock; Final Rule

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 224

[Docket No. FRA–1999–6689, Notice No. 4]

RIN 2130–AB41

Reflectorization of Rail Freight Rolling Stock

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: FRA is issuing this final rule to mandate the reflectorization of freight rolling stock (freight cars and locomotives) to enhance the visibility of trains in order to reduce the number and severity of accidents at highway-rail grade crossings in which train visibility is a contributing factor. This rule establishes a schedule for the application of retroreflective material and prescribes standards for the construction, performance, application, inspection, and maintenance of the material.

DATES: *Effective Date:* March 4, 2005. The incorporation by reference of a certain publication listed in the rule is approved by the Director of the Federal Register as of March 4, 2005.

FOR FURTHER INFORMATION CONTACT: Dr. Tom Blankenship, Mechanical Engineer, Office of Safety, FRA, 1120 Vermont Ave., NW., Mailstop 25, Washington, DC 20590 (telephone: 202–493–6446); Mary Plache, Industry Economist, Office of Safety, FRA, 1120 Vermont Ave., NW., Mailstop 25, Washington, DC 20590 (telephone: 202–493–6297); or Lucinda Henriksen, Trial Attorney, Office of Chief Counsel, FRA, 1120 Vermont Ave., NW., Mailstop 10, Washington, DC 20590 (telephone: 202–493–6038).

SUPPLEMENTARY INFORMATION:

Background

On November 6, 2003, FRA published a notice of proposed rulemaking (NPRM) proposing to require retroreflective material on the sides of freight rolling stock (freight cars and locomotives) to enhance the visibility of trains. 68 FR 62942. The NPRM represented a partial solution to a safety problem that has long concerned FRA—the need to reduce the incidence and severity of collisions between motor vehicles and trains at highway-rail grade crossings throughout the United States, especially during conditions of darkness or reduced visibility.

As noted in the NPRM, approximately 4,000 times each year, a train and a highway vehicle collide at a highway-rail grade crossing in the United States. Approximately 23% of all highway-rail grade crossing accidents involve motor vehicles running into trains occupying grade crossings (''RIT'' accidents). Many of these RIT accidents occur during nighttime conditions (dawn, dusk, and darkness) and involve a highway vehicle striking a train behind the first two units of the consist. This suggests that a contributing factor to many RIT accidents is the difficulty motorists have in seeing a train consist at a crossing in time to stop their vehicles before reaching the crossing, particularly during periods of limited visibility, such as dawn, dusk, darkness, or during adverse weather conditions.

As explained in the NPRM, the physical characteristics of trains, in combination with the characteristics of grade crossings (*e.g.*, grade crossing configuration, type of warning devices at a crossing, rural background environment with low level ambient light, or visually complex urban background environment, etc.), and the inherent limitations of human eyesight, often make it difficult for motorists to detect a train's presence on highway-rail grade crossings, particularly during periods of limited visibility. Freight trains lack conspicuity in different environmental settings. For example, trains are typically painted a dark color and are often covered with dirt and grime which are inherent in the railroad environment. With the exception of locomotives, trains are usually unlighted and are not equipped with reflective devices. Similarly, a large percentage of crossings are not lighted. Consequently, much of the light from an approaching motor vehicle's headlights is absorbed by the freight cars, instead of being reflected back toward the motorist. In addition, the large size of freight cars also makes them difficult to detect. For instance, even if a motorist is looking for a train, if the locomotive has already passed, it is difficult to detect the freight cars because the cars often encompass the motorist's entire field of view and have the tendency to ''blend'' into the background environment, especially at night. Also, because most drivers involved in grade crossing accidents are familiar with the crossings and with roadway features at the crossings, the drivers become habituated (or preconditioned) to the crossings. Based on previous driving experiences and conditioning, a driver may not expect a train to be occupying a crossing, and without a clear auditory signal (because the locomotive has already cleared the crossing) or visual stimuli alerting the driver to a train traveling through the crossing, the driver may fail to perceive the train in time to stop. This condition is further exacerbated when a train is stopped on a crossing.

There is currently no requirement for lighting or reflective markings on freight rolling stock. However, as explained in the NPRM, reflectorization has become an indispensable tool for enhancing visibility in virtually all other modes of transportation, including air, highway, maritime, and pedestrian travel. For example, airplanes and motor vehicles are equipped with high brightness retroreflective material at key locations on the exterior surfaces to increase their conspicuity. Microprismatic corner cube retroreflectors (which have the ability to direct light rays back to the light source) are typically used on roadway signs that warn of construction or other hazardous conditions. Federal regulations require retroreflective materials on the sides and rear of large trucks to increase their conspicuity and to aid motorists in judging their proximity to these vehicles. Even regulations addressing bicycle safety have specific requirements on the use of reflective materials. Lifesaving marine equipment, such as life vests and rafts, require reflectorization; and to enhance the conspicuity of pedestrians, especially at night, retroreflective material has been incorporated into clothing and similar items.

The everyday use of reflectors indicates their acceptance to delineate potential hazards and obstructions in a vehicle's path of travel. Research specific to the railroad industry has demonstrated that reflective materials can increase the conspicuity of freight cars, thereby enhancing motorists' ability to detect the presence of trains in highway-rail grade crossings. Reflective material on rail equipment increases visibility inexpensively, and does not require a power source to produce light, but returns light produced from another source (*i.e.*, an approaching automobile's headlights). This greater visibility can help drivers avoid some accidents and reduce the severity of other accidents that are unavoidable. Accordingly, FRA, as the Federal agency responsible for ensuring that America's railroads are safe for the traveling public, and in direct response to a Congressional mandate, is issuing this final rule requiring the application of reflective material on the sides of certain rail cars and locomotives to enhance the visibility of trains in order to reduce the number and severity of

accidents at highway-rail grade crossings where train visibility is a contributing factor.

A. Statutory Authority and Congressional Mandate

FRA has broad statutory authority to regulate all areas of railroad safety. The Federal Railroad Safety Act of 1970 (Safety Act) (formerly 45 U.S.C. 421, 431 *et seq.*, now found primarily in chapter 201 of Title 49) grants the Secretary of Transportation (''Secretary'') rulemaking authority over all areas of railroad safety (49 U.S.C. 20103(a)) and confers all powers necessary to detect and penalize violations of any rail safety law. This authority was subsequently delegated to the FRA Administrator (49 CFR 1.49). (Until July 5, 1994, the Federal railroad safety statutes existed as separate acts found primarily in Title 45 of the United States Code. On that date, all of the acts were repealed, and their provisions were recodified into Title 49.)

The term ''railroad'' is defined in the Safety Act to include

all forms of non-highway ground transportation that runs on rails or electromagnetic guideways, * * * other than rapid transit operations within an urban area that are not connected to the general railroad system of transportation.

49 U.S.C. 20102. This definition makes clear that FRA has jurisdiction over (1) rapid transit operations within an urban area that are connected to the general railroad system of transportation, and (2) all freight, intercity, passenger, and commuter rail passenger operations regardless of their connection to the general railroad system of transportation or their status as a common carrier engaged in interstate commerce. FRA has issued a policy statement describing how it determines whether particular rail passenger operations are subject to FRA's jurisdiction (65 FR 42529 (July 2,2000)); the policy statement can be found in Appendix A to 49 CFR parts 209 and 211.

Pursuant to its statutory authority, FRA promulgates and enforces a comprehensive regulatory program to address railroad track, signal systems, railroad communications, rolling stock, rear-end marking devices, safety glazing, railroad accident/incident reporting, locational requirements for dispatching of U.S. rail operations, safety integration plans governing railroad consolidations, merger and acquisitions of control, operating practices, passenger train emergency preparedness, alcohol and drug testing, locomotive engineer certification, and workplace safety.

In 1994 Congress passed the Federal Railroad Safety Authorization Act of 1994, Public Law 103–440 (''Act''). The Act added section 20148 to title 49 of the United States Code. Section 20148 required the Secretary, and by delegation, FRA, to conduct a review of the Department of Transportation's (''Department'') rules with respect to the visibility of railroad cars and mandated that if the review established that enhanced railroad car visibility would likely improve safety in a cost-effective manner, the Secretary initiate a rulemaking proceeding to ''prescribe regulations requiring enhanced visibility standards for newly manufactured and remanufactured railroad cars.'' Section 20148 specifically directed the Secretary to examine the use of reflectors. Section 20148 reads as follows:

(a) REVIEW OF RULES.—The Secretary of Transportation shall conduct a review of the Department of Transportation's rules with respect to railroad car visibility. As part of this review, the Secretary shall collect relevant data from operational experience by railroads having enhanced visibility measures in service.

(b) REGULATIONS.—If the review conducted under subsection (a) establishes that enhanced railroad car visibility would likely improve safety in a cost-effective manner, the Secretary shall initiate a rulemaking proceeding to prescribe regulations requiring enhanced visibility standards for newly manufactured and remanufactured railroad cars. In such proceeding the Secretary shall consider, at a minimum—

(1) visibility of railroad cars from the perspective of nonrailroad traffic;

(2) whether certain railroad car paint colors should be prohibited or required;

(3) the use of reflective materials;

(4) the visibility of lettering on railroad cars;

(5) the effect of any enhanced visibility measures on the health and safety of train crew members; and

(6) the cost/benefit ratio of any new regulations.

(c) EXCLUSIONS.—In prescribing regulations under subsection (b), the Secretary may exclude from any specific visibility requirement any category of trains or railroad operations if the Secretary determines that such an exclusion is in the public interest and is consistent with railroad safety.

B. History of Railroad Car Conspicuity Issue

As explained in the NPRM, the term ''conspicuity,'' as applied to rail car visibility, refers to the characteristics of a rail car in its roadway setting to command the attention of approaching motorists and be recognizable to reasonably prudent motorists at sufficient distance to allow the motorists to reduce their vehicles' speed and take action to avoid collisions. As also noted in the NPRM, the issue of rail car ''conspicuity'' is not a new concept. Research dating back to the early 1950's identified the potential viability of rail car conspicuity materials such as luminous sources (lights on rail cars), self-luminous sources (phosphorescent), and reflective sources. By the 1970's, researchers had generally concluded that although luminous and reflective sources both proved effective in enhancing the visibility of trains, reflectors provided conspicuity at a greater distance and field of vision. Although the general consensus of historical research was that reflective materials could increase the conspicuity of objects to which they are attached, previous generations of reflective materials did not reflect enough light to be effective in the railroad environment and lacked the durability to survive the harsh railroad operating environment.

FRA first evaluated the use of reflective material on rail rolling stock in the early 1980s and supported a study completed in 1982 on the potential use of reflectorization to reduce nighttime accidents at highway-rail intersections. The study concluded that although the use of reflective material enhanced the visibility of trains, the reflective material was not durable enough to withstand the harsh railroad environment. It was decided that rulemaking action was not warranted at that time.

Since 1982, however, improvements in the brightness, durability, and adhesive properties of reflective material have been achieved. Specifically, a new material—microprismatic retroreflective material—was developed. Because of the technological advances in reflective materials and the creation of microprismatic retroreflective material, FRA renewed its research efforts in the early 1990s. By 1999, FRA's research had led to the conclusion that the durability and adhesive properties of the new microprismatic retroreflective material could provide adequate luminance intensity levels which could be sustained for up to 10 years with minimum maintenance. *See Safety of Highway-Railroad Grade Crossings: Freight Car Reflectorization*, DOT/FRA/ORD–98/11, John A. Volpe National Transportation Systems Center (Jan. 1999) (1999 Volpe Report).[1] A copy of the 1999 Volpe Report is in the docket

[1] A more detailed description of FRA's studies of freight car reflectorization can be found in the NPRM (*See* 68 FR 62946—62949) and, where relevant, the Section-by-Section analysis that follows in this preamble.

of this proceeding (Document No. FRA–1999–6689–17).

In order to provide an opportunity for all interested parties to share their views, concerns, and experiences with regard to rail car reflectorization, subsequent to the publication of the 1999 Volpe Report, in July 1999 FRA hosted a workshop on reflectorization of rail rolling stock. Representatives from the railroad industry, reflector manufacturing and supply companies, the National Transportation Safety Board and the National Highway Traffic Safety Administration (NHTSA), as well as other interested parties participated in the workshop. During the workshop, discussion focused on the potential effectiveness of rail car reflectorization under a variety of circumstances (*e.g.*, the potential effectiveness of reflectors during the nighttime versus the daytime, at passively protected crossings versus actively protected crossings), as well as more practical aspects of any rail car reflectorization program (*e.g.*, maintenance and cleaning requirements, when and where reflector installation would occur, and the costs involved in installing and maintaining the reflectors). A copy of the transcript of this workshop is included in the docket of this proceeding (Document No. FRA–1999–6689–7).

Recognizing that part of the review mandated by Congress included collecting relevant data from operational experience by railroads having enhanced visibility measures in service, on January 14, 2000, FRA established a public docket (Docket No. FRA–1999–6689) to provide all interested parties with a central location to both send and review relevant information concerning railcar conspicuity and to the provide a venue to gather and disseminate information on the issues. The docket in this proceeding contains several submissions from FRA, as well as comments from members of the public, local and state governments, reflective material manufacturing and supply companies, members of the railroad industry, and the regulated community. Comments submitted in response to the NPRM will be discussed in more detail below.

Because FRA's research concluded that reflectorization could enhance rail car visibility, FRA conducted a preliminary cost-benefit analysis (''Preliminary Analysis'') to determine whether reflectorization would provide a cost effective method of reducing the number of collisions at highway-rail grade crossings and the casualties and property damages which result from those collisions. The Preliminary Analysis concluded that the benefits of a uniform, nationwide freight car reflectorization program would far outweigh the costs of such a program. FRA published the results of its Preliminary Analysis in the **Federal Register** on October 26, 2001. *See* 66 FR 54326. A copy of the Preliminary Analysis is in the docket of this proceeding (Document No. FRA–1999–6689–25).

Because of the rail industry's continued interest in the issue of rail car reflectorization, FRA met with members of the regulated community on March 24, 2003, to again listen to their comments and concerns regarding reflectorization. During this meeting, participants again raised important considerations regarding many practical aspects of a potential reflectorization program (*e.g.*, a feasible schedule for the application of reflectors to rail cars, what types of reflective material would be required, reflector cleaning and maintenance responsibilities, and when and where reflectors would be applied to cars).

After careful review and consideration of all the relevant research and data, and the comments submitted in this proceeding, FRA concluded that reflectorization of rail freight rolling stock is a feasible method of enhancing rail car visibility that would improve safety in a cost-effective manner. Accordingly, FRA issued an NPRM on November 6, 2003, proposing to require the use of reflective material on the sides of certain rail cars and locomotives.

Subsequent to issuance of the NPRM, FRA held a public hearing in Washington, DC on January 27, 2004. Approximately 30 individuals representing various organizations and businesses involved in the railroad and reflector manufacturing industry participated in the hearing and their comments will be discussed in more detail below.

C. The Proposed Rule

Generally, the proposed rule required that all freight cars and locomotives that operate over a public or private highway rail grade crossing in the United States in revenue or work train service be equipped with retroreflective sheeting on both sides. The proposed rule contemplated that conforming retroreflective sheeting would be applied to freight cars on a fleet basis so that each segment of the freight car fleet would be brought into compliance within ten years, and each segment of the locomotive fleet would be brought into compliance within five years. To ensure the most efficient and cost-effective implementation of the rule, FRA proposed to require that retroreflective sheeting be applied to new freight rolling stock at the time of construction, and to existing stock when such stock was being repainted, rebuilt, or undergoing other periodic maintenance.

The proposed rule contained specific color, construction, placement, and performance requirements for the required retroreflective sheeting and also set forth a schedule for the application, inspection, and maintenance of the sheeting. Specifically, the proposed rule provided that retroreflective sheeting must meet the color and performance requirements, except for the photometric performance requirements, of American Society of Testing and Measurements' (ASTM) Standard D 4956–01, *Standard Specification for Retroreflective Sheeting for Traffic Control*, for yellow sheeting. The proposed rule set forth the minimum photometric performance requirements (*i.e.*, the minimum ''specific intensity per unit area'' or ''SIA'') that FRA determined were necessary to ensure that the yellow retroreflective sheeting would be sufficiently bright enough to attract the attention of approaching motorists early enough in the approach path so that the drivers would have time to react to avoid collisions. FRA proposed to require yellow retroreflective material, in part, because the spectral measurement of the color (approximately 550 nm) is within the peak sensitivity range of the human visual system, and accordingly, it is one of the most easily detectable colors under varying ambient light and other environmental conditions (*e.g.*, darkness, fog, haze, etc.). The performance requirements of the proposed rule were based on the material as it is initially applied. In other words, FRA proposed to require specific color, type, size, and placement requirements in order to ensure that sufficient reflectivity would be retained over time, despite the harsh railroad operating environment.

Although, as proposed, the specific amount and placement of retroreflective sheeting the rule would require on various types of freight rolling stock depended on the size of the freight car or locomotive, as well as the car type, the proposed rule generally required a vertical pattern of retoreflective material in 4x36 inch (one square foot) and 4x18 inch (one-half a square foot) strips along the entire side of freight cars and locomotives, with strips of sheeting to be located as close to each end of the car as practicable and at equidistant intervals of not more than 10 feet. In

other words, the proposed rule required four square feet of retroreflective material on each side of the typical 50-foot freight car, and for cars longer than 50 feet, one additional square foot of material for each additional ten feet in length. With certain exceptions, the proposed rule generally required that retroreflective sheeting be applied as close as practicable to 42 inches above the top of the rail to minimize the degradation of the material due to dirt and grime accumulation. FRA proposed to require the placement of at least one reflector every 10 feet, because roadway lanes in the United States are typically 10 to 12 feet wide; thus, applying retroreflective sheeting at least every ten feet along the sides of freight cars increased the likelihood of at least one reflector being in the sight path of an approaching motorist. The relatively large-sized reflectors of 4x18 inches and 4x36 inches (one-half square foot and one square foot, respectively) were proposed to minimize the degradation rate of individual strips of retroreflective sheeting.

Recognizing that the conspicuity issues surrounding locomotives differ from the issues surrounding freight cars, the proposed rule provided a more flexible approach to the reflectorization of locomotives, specifying only that a minimum amount of retroreflective material (corresponding to the amount of material required on similarly-sized freight cars) was to be equally distributed between both sides of locomotives in a pattern recognizable to motorists.

D. Discussion of Comments

FRA received approximately 40 written comments in response to the NPRM, including comments from members of the railroad industry, trade organizations, local governments, reflective material manufacturing and supply companies, a manufacturer of a photo luminescent material, as well as members of the general public. Specifically, comments were received from the following organizations: The Association of American Railroads (AAR), the Railway Supply Institute, Inc. (RSI), the North America Freight Car Association (NAFCA), Canadian National Railway Company (CN), 3M, Avery Dennison, TTX Company (TTX), the American Petroleum Institute (API), Selecto-Flash, Inc., Canadian Pacific Railway Company (CP), Railway Technology Consulting Associates, the American Association of Private Railroad Car Owners, Inc. (AAPRCO), the American Trucking Association, Truckload Carriers Association, Availvs Corporation, and the National Association of County Engineers. Several of these commenters also provided verbal testimony at the January 2004 hearing and a few additional organizations (the American Railway Car Institute (ARC) and Wheeler Decal Corporation) also participated in the hearing. The following discussion provides an overview of the written and verbal comments FRA received in response to the NPRM. More detailed discussions of specific comments and how FRA has chosen to address these comments in the final rule can be found in the relevant Section-by-Section analysis portion of this preamble.

The majority of comments submitted were in favor of reflectorization. Several individual members of the public voiced strong support for a nationwide reflectorization program. For example, one commenter submitted a February 2004 newspaper article which described an accident in which a man was killed when he drove directly into the side of a train occupying a grade crossing in his lane of travel. Apparently, the driver did not see the train at all, as witnesses at the scene reported that he did not even apply his vehicle's brakes before striking the train. Other commenters related stories of personal tragedy in which loved ones were killed as a result of accidents involving motor vehicles running into trains occupying grade crossings. One commenter wrote of her father who ran into the side of a grain train occupying a crossing. This commenter explained that other drivers who witnessed the crash reported that they did not see the train, and that if it was not for the loud crash of her father's car, they too would have run into the train. Another commenter wrote of her 16-year old son who, in late 2003, was killed early one evening when the car he was riding in ran into the side of a train occupying a grade crossing. FRA remains deeply sympathetic for the losses suffered by these commenters. As explained in the NPRM, the goal of this rulemaking is to reduce the number of such tragedies by reducing RIT accidents. In doing so, the law requires that Federal regulations be based on an analysis of all relevant evidence and data. Accordingly, this preamble focuses on the technical and economic aspects of rail car reflectorization. FRA, however, has paid careful attention to the advice of those whose tragic personal experiences have led them to support a nationwide rail car reflectorization program.

Other commenters expressing support for a nationwide freight car reflectorization program included local and state governments, as well as organizations and businesses involved in the trucking industry. Most of these commenters pointed to the prevalence of unlighted, passively protected highway-rail grade crossings in rural communities and the particular vulnerability of these types of crossings to RIT accidents. These commenters also noted the success of reflectorization in the trucking industry, and some of them recommended a more aggressive implementation schedule than the 10-year period FRA proposed for the reflectorization of freight cars.

A few railroad industry participants expressed more reserved support for FRA's overall goal of increasing rail car visibility by requiring retroeflective markings on the sides of rail cars, but these commenters, including CP and TTX, raised important practical considerations related to the implementation of a nationwide rail car reflectorization program (*e.g.,* a feasible schedule for the application of reflectors to rail cars, reflector maintenance requirements, a viable standard pattern of application of retroreflective material to various car types, and the treatment of cars already equipped with reflective material pursuant to existing voluntary rail car reflectorization programs). Other members of the railroad industry, including AAR, NAFCA, and RSI, expressed their opposition to a Federal requirement to reflectorize freight rolling stock citing cost concerns and concerns similar to those expressed by CP and TTX regarding the practicalities of implementing such a program. In addition, AAR, as the organization that sets uniform interchange rules on behalf of the railroad industry, submitted a proposed industry standard for reflective markings. In its comments, AAR indicated that it developed this proposed industry standard in conjunction with private car owners and freight car builders. Although FRA appreciates the efforts of AAR and the other industry members who developed the proposed industry standard in response to the NPRM, because the proposed standard does not meet the minimum performance requirements FRA has determined are necessary for an effective freight rolling stock reflectorization program, FRA is unable to adopt the standard as currently written. However, FRA encourages AAR to continue to work with the industry to modify the proposed industry standard to comply with the requirements of this final rule.

A few railroad industry commenters also expressed concern regarding the inspection and maintenance requirements of proposed § 224.109. Specifically, commenters expressed

concern regarding FRA's proposed 20 percent maintenance threshold, and the use of the undefined term ''damaged'' demonstrating when maintenance would be required. Additionally, commenters expressed concern regarding when and where maintenance of reflective material would take place under the proposed rule, and a few of these commenters questioned the efficacy and practicality of FRA's proposal to require the replacement of retroreflective material on rail cars every 10 years.

Although the majority of comments FRA received in response to the NPRM addressed issues related to the reflectorization of freight cars, a few railroad industry participants expressed concern regarding FRA's proposed requirements applicable to locomotives. For example, AAR suggested that given the conspicuity issues surrounding locomotives and the fact that most locomotives are already reflectorized with company names and logos, FRA should not specify a specific pattern of application of reflective material on locomotives. AAR also expressed concern regarding FRA's proposed schedule for the reflectorization of locomotives and, along with CN, suggested that the locomotive grandfathering provision of proposed § 224.107(b)(3) was too narrow.

AAR also expressed the view that FRA's proposed rule exceeded Congress's direction in 49 U.S.C. 20148. First, AAR asserted that Congress envisioned the issuance of a reflectorization requirement only if the requirement were cost-effective. FRA agrees with this assertion, and notes that, as detailed in the NPRM, the proposed rule was based on a Preliminary Analysis of costs and benefits that demonstrated that the benefits of a nationwide rail equipment reflectorization program would far outweigh the costs of such a program. *See* 66 FR 54326 or Document No. FRA–1999–6689–25 in the docket of this proceeding. Taking into consideration comments received in response to the NPRM and the Preliminary Analysis, FRA has conducted a final Regulatory Analysis of this final rule and has again concluded that the benefits to be gained from implementation of the final rule far outweigh the costs of implementing the rule. A more detailed discussion of FRA's Regulatory Evaluation is found in the Regulatory Impact and Notices Section below.

AAR also asserted that Congress did not contemplate either a retrofit requirement (except in the case of rebuilt freight cars) or an ongoing maintenance requirement, and accordingly the proposed rule exceeded Congress's direction to FRA. FRA notes, however, that section 20148 was enacted in 1994, in the midst of FRA's reflectorizaton research program, but before FRA had reached any conclusions as to the potential efficacy of a federal rail car reflectorization program. Congress's clear intent in enacting section 20148 was that after reviewing the issue of potential enhanced visibility standards for railroad cars (specifically the potential use of reflective materials), FRA follow through by, at a minimum, requiring application of reflectors to new and remanufactured equipment if that was found to be cost-effective. Further, prior to the enactment of section 20148, FRA had the authority and the responsibility to issue standards, as necessary, covering all areas of railroad safety (49 U.S.C. 20103); and nothing in the 1994 enactment narrowed that authority. Accordingly, FRA is proceeding in accordance with its preexisting authority to address public safety. FRA is confident that it is acting in a manner consistent with Congressional guidance.

FRA also notes that limiting this final rule to the narrow scope of the 1994 mandate would fall far short of the purpose underlying the policy concern on which the mandate was based. Because rail cars may remain in service for four or even five decades, while the most optimistic estimates of the product life of current retroreflective materials are less than two decades, to reflectorize only new rail equipment and to have not even minimal maintenance standards, would not achieve the enhanced visibility of rail cars Congress contemplated in section 20148. FRA has adopted a strategy that addresses the safety need underscored by Congress without unduly burdening the industry with the principal concerns that have been raised in the past with respect to a federal regulation requiring rail car reflectorization (*e.g.*, requirement for washing of reflectors, concerns over increased liability).

RSI, an international trade association of the rail supply industry, expressed the opinion that there are better alternatives to improving safety at highway-rail grade crossings than mandating the reflectorizing of freight rolling stock. In particular, RSI recommended that FRA work with the railroad industry, the Federal Highway Administration, and the States, through the Section 130 program,[2] to identify high incident crossings, make improvements to those crossings, or work to close those crossings. RSI expressed the view that installation of grade crossing warning devices, additional street lighting at crossings, or adding stop signs at little used crossings (all crossing improvements that could be made with Section 130 funds) would provide increased levels of safety.[3] Further, RSI asserted that equipping freight cars with reflectorized tape will not stop drivers from entering highway-rail grade crossings.

FRA agrees with RSI that the installation of warning devices, installation of additional illumination and warning signs at crossings, and even the closing of certain crossings, are highly effective grade crossing safety improvements. As explained in the NPRM, FRA recognizes the existence of numerous methods other than reflectorization for reducing the occurrences of RIT accidents (*e.g.*, the elimination of highway-rail grade crossings, installation and upgrading of crossing traffic control and warning devices, crossing illumination, audible train warning devices, crossbuck reflectorization). FRA believes that each of these methods, used alone and in combination, is a viable method for mitigating collision risk at highway-rail grade crossings. FRA notes, however, that local opposition to closing crossings and the associated expenses with constructing grade separations or other alternatives to crossings often render these methods impractical, if not impossible. In addition, the expenses associated with installing crossing warning devices or upgrading existing devices often render these solutions cost prohibitive. Accordingly, FRA continues to believe that the reflectorization of freight rolling stock is an additional, feasible, and cost-effective tool for reducing and mitigating grade crossing accidents that provides unique safety benefits not obtainable with other grade crossing warning devices and safety measures. For example, traffic control devices, whether active (*e.g.*, flashing lights and gates at crossings) or passive (*e.g.*, signs and pavements markings), only provide a warning to the motorist that a train may be present. The signal delivered by reflective material on the sides of rail cars is clear and indicates to approaching motorists the actual presence and current movement of a train in or through a crossing.

[2] ''Section 130 program'' refers to the program authorized by 23 U.S.C. 130 which provides States with Federal funding to eliminate hazards at public highway-rail grade crossings.

[3] It is important to note, however, that Section 130 funds can only be spent on public grade crossing improvements. The funds are not available for private rail crossings. *See* 23 U.S.C. 130.

FRA recognizes, as did one commenter in comments submitted to the docket prior to publication of the NPRM, that reflectorization is only a partial solution. This commenter recognized the limits of any program designed to enhance the visibility of trains, including reflectorization, and explained that ''[t]he most visible train is only as safe as the motor vehicle driver who encounters it.'' FRA strongly agrees with this statement and recognizes that reflectorization will provide only a partial solution to the safety issues surrounding highway-rail grade crossings. FRA recognizes, and feels it worthy of emphasis (as we did in the NPRM), that nothing in this final rule relieves motorists from the responsibility to be alert at highway-rail grade crossings and use due diligence in operating motor vehicles safely, even during times of limited visibility.

The remaining comments submitted by various members of the railroad industry reflected a near consensus on three general issues. First, commenters expressed the view that white, not yellow, was the best color choice for retroreflective material on the sides of rail cars. Second, commenters expressed the view that FRA's proposed vertical pattern of retroreflective sheeting on the sides of freight cars was impracticable, and that a more flexible approach was necessary. Third, commenters expressed the view that the installation of retroreflective material on rail cars pursuant to the rule should not be tied to the single car air brake test. These comments are discussed below in connection with the applicable provisions of the final rule.

Section-by-Section Analysis

Section 224.1 Purpose and Scope

This section contains a formal statement of the final rule's purpose and scope. As explained in the preamble to the NPRM, FRA intends that this rule cover all aspects of reflectorization of freight rolling stock, including but not limited to, the size, color, placement, and performance standards of the retroreflective material, as well as the schedule for the application, inspection, and maintenance of the material.

Paragraph (a) states that the final rule is intended to reduce highway-rail grade crossing accidents, deaths, injuries, and property damage resulting from those accidents by enhancing the conspicuity of rail freight rolling stock in order to increase its detectability by motor vehicle operators at night and under conditions of poor visibility. Paragraph (b) explains that the final rule establishes the duties of freight rolling stock owners and railroads to apply retroreflective material to freight rolling stock, and to periodically inspect and maintain that material in order to achieve cost-effective mitigation of collision risk at highway-rail grade crossings. Paragraph (c) explains that the rule establishes a schedule for the application of retroreflective material to rail freight rolling stock and prescribes standards for the application, inspection, and maintenance of retroreflective material to rail freight rolling stock for the purpose of enhancing its detectability at highway-rail grade crossings.

Although FRA believes that this section as proposed in the NPRM made clear the agency's intent for the rule to encompass the entire subject matter of freight car reflectorization and that additional duties related to reflectorization of freight rolling stock (*e.g.*, cleaning of the material) could not be imposed on freight rolling stock owners, the AAR expressed concern in its comments that ''there could be confusion later as to whether railroads or private car owners are obliged to clean dirt and grime from freight cars.'' Accordingly, in this final rule, FRA has revised paragraph (b) of this section to specifically state that not only are freight rolling stock owners under no duty to ''install, maintain, or repair reflective material,'' except as required by the rule, but freight rolling stock owners are also under no duty to clean the material. For further discussion of dirt and grime on cars, please refer to the discussion of the term ''obscured'' in § 224.5.

As explained in the preamble to the NPRM, this final rule will not restrict freight rolling stock owners from applying retroreflective material to freight rolling stock on an accelerated schedule, nor will this rule restrict freight rolling stock owners from applying additional retroreflective material. As also explained in the NPRM, freight rolling stock owners, however, are under no duty to install, maintain, or repair reflective material except as specified in this rule.

Section 224.3 Applicability

This section, which has not changed from that proposed in the NPRM, establishes that this final rule applies, with certain exceptions, to all freight cars and locomotives that operate over a public or private highway-rail grade crossing and are used for revenue or work train service. This section specifically excludes certain operations and equipment from the rule. These include: (1) Freight railroads that operate only on track inside an installation that is not part of the general railroad system of transportation, (2) rapid transit operations within an urban area that are not connected to the general system of transportation, and (3) locomotives or passenger cars used exclusively in passenger service.

As explained in the preamble to the NPRM, FRA recognizes that both public and private grade crossings may be found on plant railroads and freight railroads that are not part of the general railroad system of transportation. Because these operations typically involve low speed vehicular traffic and the rail operations themselves are typically low speed with a small number of rail cars permitting relatively short stopping distances, it is not clear that reflectorization would be helpful in these areas. These reasons, together with FRA's historical basis for not making its regulations applicable to plant and non-general-system freight railroads, have led FRA to exclude such plant and private railroads from this rule. FRA does, of course, retain the statutory right to assert jurisdiction in this area and will do so if circumstances warrant.

As proposed in the NPRM and adopted in this final rule, paragraph (c) provides that the rule will not apply to locomotives and passenger cars used ''exclusively'' in passenger service. FRA decided to exclude locomotives and passenger cars used exclusively in passenger service from this rule because the conspicuity issues attendant to passenger service are significantly different from those of freight service. For example, the highway-rail grade crossings through which passenger trains operate are typically better protected than crossings used exclusively in freight service, many passenger cars have bright stainless steel exteriors or are painted contrasting light colors and are maintained in a much cleaner condition than freight cars, and passenger cars typically have inside lights which are visible through side windows that run the entire length of the cars. Although this final rule does not require the application of reflective material to locomotives and passenger cars used exclusively in passenger service, FRA may do so in a future rulemaking if it proves a cost-effective method of mitigating collision risk at highway-rail grade crossings.

One commenter, AAPRCO, expressed concern regarding the word ''exclusively'' in paragraph (c). AAPRCO explained that its members are owners of privately owned passenger cars and vintage locomotives, which generally run on Amtrak in passenger service. AAPRCO further explained,

however, that these cars are also occasionally moved in freight service; typically dead-head moves to a new location or to another carrier where the cars may again be used in passenger service, or a switching move from one passenger carrier to a storage location. AAPRCO expressed concern that the term ''exclusively'' in paragraph (c) of this section would cause the rule to apply to these cars and locomotives when they are occasionally moved in freight service. Further, AAPRCO explained that they do not believe ''that FRA intends for such moves to convert a passenger car or locomotive into freight rolling stock'' for purposes of the rule. AAPRCO is correct. FRA does not intend that these types of moves would convert the equipment into freight rolling stock subject to the rule. However, FRA believes § 224.3, as proposed, is clear in this regard. Section 224.3 states that, with certain exceptions, the rule applies to ''railroad freight cars and locomotives that operate over a * * * grade crossing and are used for revenue or work train service.'' As proposed in the NPRM and adopted in this final rule, ''railroad freight car'' is defined consistent with 49 CFR 215.5, which provides that a railroad freight car is ''a car designed to carry freight, or railroad personnel, by rail,'' including, for example, box cars, gondola cars, or tank cars. The passenger cars described by AAPRCO would not fall within the rule's definition of ''railroad freight car'' and accordingly, would not be subject to the rule's requirements. Further, as proposed in the NPRM and adopted in this final rule, ''locomotive'' is generally defined consistent with 49 CFR 229.5, but specifically limited to locomotives used in the transportation of freight or the operation of a work train. Accordingly, unless an AAPRCO member's locomotive is pulling freight or providing power to a work train, their locomotives will not be subject to this rule.

Section 224.5 Definitions

This section defines various terms, which for purposes of this rulemaking, have very specific meanings. This final rule retains each of the definitions proposed in the NPRM, with minor revisions to three of the proposed definitions (''flat car,'' ''obscured,'' and ''work train''). In addition, FRA has added two definitions to those proposed in order to clarify requirements of this final rule. First, in response to several commenters' concerns regarding the term ''damaged'' in proposed section 224.109, FRA has added a definition of that term. Second, FRA has defined a new term, ''unqualified retroreflective sheeting,'' which is used in § 224.107 of this final rule.

First, the definition of ''flat car'' has been modified to make it clear that spine cars, articulated, and multi-unit intermodal cars are included within this definition.

Second, the definition of ''freight rolling stock owner'' has been modified slightly to make it clear that the term is intended to refer to not only lessors of freight rolling stock, but to lessees of freight rolling stock as well. As explained in the NPRM, FRA recognizes that the majority of domestically-owned freight cars are privately owned. Because private freight car owners often contract with others to maintain their cars and may not even see their cars on a regular basis, this definition contemplates that anyone who controls the maintenance or use of freight cars by contractual agreements or otherwise, will also be responsible for compliance with this part in conjunction with the actual owners of the cars.

Third, the definition of the term ''obscured'' has been modified slightly for clarity in response to a commenter's express concern. ''Obscured'' was defined in the NPRM to mean ''concealed or hidden (*i.e.*, covered up, as where a layer of paint or dense chemical residue blocks incoming light).'' Specifically excluded from the proposed definition were ordinary accumulations of dirt, grime, or ice resulting from the normal railroad operating environment. One commenter, NAFCA, pointed out an incongruity between FRA's proposed definition of the term ''obscured'' in the text of the proposed rule and FRA's explanation of the term in the preamble. Specifically, in the preamble to the NPRM, FRA explained that the term ''obscured'' was intended to refer to situations where ''retroreflective material is covered with paint (*e.g.*, graffiti), a dense chemical residue (*e.g.*, product spilled from a tank car), or any other foreign substance, other than dirt or grime, which effectively blocks *all* incoming light.'' 68 FR 62952 (emphasis added). In its comments, NAFCA expressed the view that ''[t]he test for replacement should be as objective as possible, and ultimately should turn on whether the strip is in a condition that 'effectively blocks all incoming light', a test used by FRA to explain the purpose of the definition of 'obscured'.'' FRA agrees with this comment and accordingly, in this final rule, we have revised the definition of ''obscured'' to reflect that in order for material to be ''obscured'' under this rule, it has to be concealed or hidden to the point where all incoming light is blocked.

As explained in the NPRM, the definition of ''obscured'' was intended to reflect FRA's understanding that the harsh railroad operating environment inevitably results in dirt accumulating on the sides of freight rolling stock. The standards for retroreflective material set forth in this final rule take into account this ordinary accumulation. For example, FRA understands that the sides of coal cars will accumulate coal dust and other dirt over time due to the nature of normal railroad operations. An accumulation of coal dust or other dirt, even if it significantly darkens and dirties the retroreflective material, will not cause the material to be ''obscured'' for purposes of this rule. The standards proposed in this rule account for the effects of accumulations of dirt and grime inherent in the railroad operating environment, the aging of the reflective material, and other adverse effects of the operating environment (*e.g.*, harsh weather conditions). FRA believes that reflective material meeting the requirements of this rule when initially applied will still provide adequate reflectivity throughout the manufacturers' stated useful life despite inevitable accumulations of dirt.

Fourth, the definition of ''work train'' has been revised to make it clear that the term, for purposes of this rule, refers to non-revenue generating trains used in the maintenance and upkeep of the railroad.

In its comments to the NPRM, AAR noted that the term ''damaged'' was not defined and, therefore, it was unclear what FRA meant by the term in proposed § 224.109. NAFCA similarly noted that the term ''damaged'' in the proposed rule was undefined and, thus, ''highly subjective.'' Accordingly, both NAFCA and AAR suggested that FRA delete the term ''damaged'' from the inspection standards of § 224.109. FRA agrees that the undefined term ''damaged'' in the proposed rule needed clarification. Accordingly, in this final rule, FRA has included a definition for the term ''damaged.'' Section 224.104 defines ''damaged'' to mean ''scratched, broken, chipped, peeled, or delaminated.'' This definition is intended to be consistent with the term ''obscured,'' but recognizes the physical reality that retroreflective sheeting could be damaged to the extent that it is no longer effective, but still not be ''obscured'' as defined in this rule.

FRA has added one additional new term: ''unqualified retroreflective sheeting.'' In this final rule ''unqualified retroreflective sheeting'' is defined as ''engineering grade sheeting, super

engineering grade sheeting (enclosed lens), or high intensity type sheeting (ASTM Type I, II, III, or IV Sheeting) as described in ASTM International Standard D 4956–01a, *Standard Specification for Retroreflective Sheeting for Traffic Control.* A more detailed discussion of this new term can be found in the analysis of § 224.107 below.

As defined in the NPRM, ''freight rolling stock'' means any locomotive subject to 49 CFR part 229 used to haul or switch freight cars in revenue or work train service and any railroad freight car subject to 49 CFR part 215, including a car stenciled MW pursuant to § 215.305. FRA specifically requested comments as to what other types of rail equipment (other than locomotives subject to 49 CFR part 229) are used to haul freight cars and the feasibility of reflectorizing such equipment. FRA also specifically requested comments as to the utility and feasibility of equipping specialized maintenance of way equipment with reflective material. Although FRA received no comments in response to the first question regarding other types of rail equipment used to haul freight cars, the AAR responded to FRA's second question regarding the utility of equipping specialized maintenance of way equipment with reflective material. AAR responded by saying that specialized maintenance of way vehicles should not be subject to any reflectorization rule. Specifically, AAR noted that none of the approximately 700 collisions in the accident pool identified in FRA's Regulatory Evaluation involved specialized maintenance of way equipment and that trains with maintenance of way cars typically consist of only a few units. Thus, AAR reasoned that FRA's stated safety justification for proposing to require reflective material on freight rolling stock (*i.e.*, reducing the number and severity of grade crossing accidents where motor vehicles run into trains after the first two units of the consist) was inapplicable to specialized maintenance of way vehicles. FRA agrees with AAR's rationale in this regard, and accordingly we have retained the definition of freight rolling stock as proposed.

In order to ensure that the requirements of this part would be practicable for each type of freight car to which they would apply, FRA proposed definitions in the NPRM for ''railroad freight car,'' ''flat car,'' and ''tank car'' and then proposed specific patterns of reflector markings for each type of car based on the typical physical configuration of each car type. FRA specifically requested comments on the use of these definitions (*i.e.*, whether the proposed definitions were adequate to identify car types for purposes of the rule or whether commenters had other definitions that they would prefer). Because FRA received no comments in response to this request, FRA has adopted the definitions substantially as proposed.

Section 224.7 Waivers

This section, which has not changed from that proposed in the NPRM, explains the process for requesting a waiver from a provision of this rule. Requests for such waivers may be filed by any party affected by the final rule. In reviewing such requests, FRA conducts investigations to determine if a deviation from the general regulatory criteria is in the public interest and is consistent with railroad safety. The rules governing the FRA waiver process are found in 49 CFR part 211.

Section 224.9 Responsibility for compliance

This section, which has not changed from that proposed in the NPRM, contains the general compliance requirements. Paragraph (a) states that freight rolling stock owners (as defined in § 224.5), railroads, and (with respect to certification of material) manufacturers of retroreflective material, are primarily responsible for compliance with the rule. The responsibility of manufacturers is discussed in more detail in the analysis of § 224.103(a) below.

Paragraph (a) also clarifies FRA's position that the requirements contained in the rule are applicable to any ''person'' (as defined in the rule) that performs any function or task required by the proposed rule. Although various sections of the rule address the duties of freight rolling stock owners, railroads, and manufacturers of retroreflective material, FRA intends that any person who performs any action on behalf of any of these parties or any person who performs any action covered by the rule is required to perform that action in the same manner as required of the freight rolling stock owner, railroad, or manufacturer, or be subject to FRA enforcement action. For example, employees or agents of freight rolling stock owners, or railroad contractors who perform duties covered by this final rule would be required to perform those duties in the same manner as required of a freight rolling stock owner or railroad. Likewise, employees or agents of manufacturers of retroreflective sheeting being manufactured pursuant to this part would be required to perform those duties in the same manner as the manufacturer.

Paragraph (b) states that any person performing any function or task required by this part will be deemed to have consented to FRA inspection of the person's facilities and records to the extent necessary to ensure that the function or task is being performed in accordance with the requirements of this part. This provision is intended to put freight rolling stock owners, railroads, manufacturers, and contractors, performing functions or tasks required by this part, on notice that they are consenting to FRA's inspection for rail safety purposes of that portion of their facilities and records relevant to the function or task required by this part. Pursuant to 49 U.S.C. 20107, FRA has the statutory authority to inspect any facilities and relevant records pertaining to the performance of functions or tasks required under this part, and this provision is merely intended to make that authority clear to all persons performing such tasks or functions.

Section 224.11 Penalties

This section identifies the penalties that FRA may impose upon any person who violates any requirement of this part. These penalties are authorized by 49 U.S.C. 21301, 21302, and 21304. The penalty provision parallels penalty provisions included in numerous other safety regulations issued by FRA and has been adopted in this final rule substantially as proposed. As explained in the NPRM, essentially, any person who violates any requirement of this part or causes the violation of any such requirement will be subject to a civil penalty. As also explained in the NPRM, civil penalties may be assessed against individuals only for willful violations and each day a violation continues will constitute a separate offense. As proposed in the NPRM, the minimum civil penalty was $500 per violation, and the maximum civil penalty for a grossly negligent violation or a pattern of repeated violations that creates an imminent hazard of death or injury to persons, or causes death or injury, was $22,000. Since the date of publication of the NPRM, however, to comply with the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101–410) (28 U.S.C. 2461, note) and the Debt Collection Improvement Act of 1996 (Pub. L. 103–134, 110 Stat. 1321–373), FRA has adjusted the minimum and maximum civil penalties applicable to each of the agency's regulations to $550 and $27,000, respectively. 69 FR 30591 (May 28, 2004). Accordingly, this final rule incorporates these revised

minimum and maximum penalty amounts. Furthermore, a person may be subject to criminal penalties under 49 U.S.C. 21311 for knowingly and willfully falsifying reports required by these regulations.[4] FRA believes that the inclusion of penalty provisions for failure to comply with the regulations is important in ensuring that compliance is achieved. This final rule includes a schedule of civil penalties as Appendix A to this part. Because the penalty schedule is a statement of agency policy, notice and comment was not required prior to its issuance. *See* 5 U.S.C. 553(b)(3)(A).

Section 224.13 Preemptive Effect

This section, which has not changed from that proposed in the NPRM, informs the public as to FRA's intention regarding the preemptive effect of the final rule. While the presence or absence of such a section does not conclusively establish the preemptive effect of a final rule, it informs the public concerning the statutory provisions which govern the preemptive effect of the rule and FRA's intentions concerning preemption.

This section points out that the preemptive effect of this rule is governed by 49 U.S.C. 20106 (''section 20106''). Section 20106 provides that all regulations prescribed by the Secretary relating to railroad safety preempt any State law, regulation, or order covering the same subject matter, except a provision necessary to eliminate or reduce an essentially local safety hazard that is not incompatible with a Federal law, regulation, or order, and that does not unreasonably burden interstate commerce. With the exception of a provision directed at an essentially local safety hazard that is not inconsistent with a Federal law, regulation, or order, and that does not unreasonably burden interstate commerce, section 20106 will preempt any State or local law or regulatory agency rule covering the same subject matter as this final rule.

The Supreme Court has consistently interpreted section 20106 to confer on the Secretary the power to preempt not only State statutes, but State common law as well. *See CSX Transp.* v. *Easterwood,* 507 U.S. 658, 664 (1993) (''[L]egal duties imposed on railroads by the common law fall within the scope of [the] broad phrases'' of section 20106.). *See also Norfolk Southern Ry. Co.* v. *Shanklin,* 529 U.S. 344 (2000). The Court has further held that Federal regulations under the Federal Railroad Safety Act will preempt common law where the regulations ''substantially subsume'' the subject matter of the relevant State law. *Easterwood,* 507 U.S. at 664.

As is evident in the language of § 224.1 as proposed and as incorporated in this final rule, FRA intends this final rule to cover the subject matter of standards for the use of retroreflective materials on freight rolling stock and the specific duties of freight rolling stock owners in this regard. FRA intends this part to preempt any State law, rule, or regulation, or common law theory of liability that might attempt to impose a duty on freight rolling stock owners pertaining to the reflectorization of freight rolling stock that is not specifically set forth in this part. For example, FRA intends to preempt any State law or common law theory of liability which might attempt to impose a duty on freight rolling stock owners to apply additional retroreflective material other than that specified in this part, to apply retroreflective material on a different schedule than that specified in this part, or to inspect or maintain retroreflective material on a more frequent basis than that specified in this part. Inference of any duties not specifically set forth in this part may cause the costs of the rule to outweigh the safety benefits of the rule in direct conflict with the Congressional mandate of 49 U.S.C. 20148 (requiring that FRA initiate a rulemaking proceeding prescribing regulations requiring enhanced visibility standards for railroad cars if such regulations would likely improve safety in a cost-effective manner).

In response to the NPRM, RSI specifically requested that FRA expressly state in the preamble to the final rule that FRA could not envision any set of circumstances where an additional State requirement could be justified under the local hazard exception contained in section 20106. Although FRA cannot envision any set of circumstances where an additional State requirement could be justified under the local hazard exception, FRA cannot anticipate every possible factual scenario that could exist. Also, it is important to note that although FRA can express its intention regarding preemption, the courts will make the final determination of preemption.

Section 224.15 Special Approval Procedures

This section contains the procedures to be followed when seeking to obtain FRA approval of alternative standards under § 224.103(e). Although FRA received no written comments in direct response to proposed § 224.15, at the January 2004 hearing one commenter, an association of industry participants (particularly car builders), expressed the view that the proposed rule's ''special approval procedures'' were too ''cumbersome and lengthy.'' This commenter further stated that ''[a] negative determination could prevent a car design from being built. If we can't apply the markers the way the rule requires, we may not be able to build the car.'' (Hearing transcript, pp. 65–66). This commenter, however, appears to have misconstrued the intent of § 224.15. As explained in the preamble to the NPRM, FRA anticipates continued technological improvements and product advances in the field of reflective and luminescent materials. Accordingly, FRA intends this section to provide a relatively quick approval process to allow the incorporation of new technology into the standards of this part, thereby making the technology available to all car owners and railroads while maintaining the same level of safety originally contemplated. FRA does not intend that this section provide a procedure for the approval of alternative reflectorization patterns. Although FRA believes that the reflectorization patterns set forth in this final rule are flexible enough to ensure that reflectors can be applied to almost any freight car or locomotive type, should it be necessary for a freight rolling stock owner to apply retroreflective material in a pattern that does not conform with the requirements of this final rule, pursuant to § 224.7 of this final rule, the owner may file for a waiver from the requirements of § 224.106. The waiver process is discussed in more detail in the analysis of § 224.7 above.

Another commenter specifically requested that the proposed rule be modified to be ''technologically neutral'' and be a performance standard that does not discriminate based on the specific technology employed. This commenter, Availvs Corporation, a manufacturer of photo luminescent material, asserted that its ''state-of-the-art photo luminescent material * * * works as well as, or better than, any retroreflective material'' in enhancing the visibility of rail equipment. Availvs noted that the company has previously demonstrated its product to FRA and that in 2003 the product was ''satisfactorily tested'' by the American Society for Testing and Materials. Because FRA does not currently have

[4] FRA notes that the criminal penalty provision was inadvertently omitted from § 224.11 of the proposed rule. However, FRA has corrected this error and has incorporated the criminal penalty provision into this final rule, consistent with its statutory authority and the penalty provisions of FRA's other existing safety regulations.

enough data to determine whether Availvs's product would meet the same performance standards contemplated in this final rule, FRA cannot revise the proposed rule to provide for the use of material other than the specified retroreflective material. However, FRA encourages Availvs to take advantage of the special approval process of § 224.15 to provide FRA the opportunity to determine whether Availvs's product would provide at least an equivalent level of safety as the retroreflective material mandated in this final rule.

FRA believes the procedures set forth in § 224.15 will speed the process for taking advantage of new technologies over that which is currently available through the waiver process. However, in order to provide an opportunity for all interested parties to provide input for use by FRA in its decision making process, as required by the Administrative Procedure Act, 5 U.S.C. 553 *et seq.* (APA), FRA believes that any special approval provision must, at a minimum, provide proper notice to the public of any significant change or action being considered by the agency with regard to the existing regulations.

Paragraph (b) sets forth the substantive and procedural requirements for petitions for special approval of alternative standards; paragraphs (c) and (d) provide opportunity for notice and public comment on any petition for special approval of an alternative standard received by FRA; and paragraph (e) describes the process FRA will follow in acting on any such petitions.

Subpart B—Application, Inspection, and Maintenance of Retroreflective Material

Section 224.101 General Requirements

This section contains the general requirement that all rail freight rolling stock subject to this part be equipped with retroreflective sheeting conforming to the requirements of this rule and the sheeting be applied, inspected, and maintained in accordance with subpart B or in accordance with an alternative standard approved under § 224.15. As explained in the preamble to the NPRM, this general requirement reflects FRA's understanding that motorists need to be given as much visual information as possible to correctly decide whether a hazard (*e.g.*, a train) exists in a vehicle's path. Specifically, devices intended to make a train conspicuous should: (1) Tell the motorist that something is there, (2) tell the motorist that what he or she sees is a train, (3) tell the motorist whether the train is on or about to cross a road in the vehicle's path, (4) aid the motorist in estimating the distance he or she is from the train, and (5) aid the motorist in estimating the speed and direction of the train's motion. FRA believes that the retroreflective sheeting required in this subpart B, applied and inspected in conformance with this part, effectively achieves these objectives.

Section 224.103 Characteristics of Retroreflective Sheeting

This section sets forth the construction, color, and performance standards for the retroreflective sheeting required by § 224.101. As was proposed in the NPRM, paragraph (a) of this section in the final rule states that retroreflective sheeting must be constructed of a smooth, flat, transparent exterior film with microprismatic elements embedded or suspended beneath the film so as to form a non-exposed retroreflective optical system.

As proposed in the NPRM, paragraph (a) of this section also required that air encapsulated sheeting be sealed around all edges. This proposed requirement was based on FRA's understanding that air encapsulated sheeting that is not sealed on all edges allows water to seep between the layers of the product and over time, due to the normal railroad operating environment, this water will freeze and expand, causing layers of the sheeting to peel. One commenter, Avery Dennison, a manufacturer of retroreflective sheeting already in common use in the railroad industry, expressed agreement with FRA's proposal to require edge sealing of air encapsulated sheeting. Specifically, Avery Dennison explained that ''the typical welds used to enclose individual cells are very thin, and inadequate for the demands placed on exposed edges.'' Other commenters, however, including 3M, another manufacturer of reflective materials already commonly used on railroad equipment, and the AAR, expressed the view that edge sealing should not be required on ''enclosed lens sheeting.'' [5] 3M explained that ''[r]etroflective sheeting that incorporates air between laminations contains internal seals that * * * prevent the penetration of water'' and that ''[o]nly the small portions of individual cells that are cut open along the edge of a piece of sheeting could be affected by water penetration.'' Further, 3M explained that the open, exposed edge of the sheeting does not affect the durability or performance of the sheeting as a whole and that air encapsulated sheeting (*i.e.,* sheeting with exposed cut edges) is routinely used on traffic signs and vehicles without edge sealing and is warranted for up to 12 years. Although 3M acknowledged that historically, many years ago, edge sealing was sometimes used, 3M indicated that given the current construction and durability of retroreflective material, it is no longer necessary, and accordingly, the company no longer manufactures, markets, or recommends edge sealing.

In light of 3M's comments and absent conclusive evidence establishing that edge sealing is necessary to maintain the integrity of air encapsulated retroreflective sheeting, in this final rule FRA is not mandating that air encapsulated retroreflective sheeting be edge sealed. As explained in detail in the NPRM, the construction, color, and performance standards set forth in this rule are designed to ensure that retroreflective material applied pursuant to this rule is durable enough to withstand the harsh railroad operating environment and maintain sufficient levels of reflectivity throughout the useful life of the material. FRA notes, however, that it is the responsibility of the retroreflective material manufacturer and the customer to determine the suitability of particular materials for use on rail car sides. FRA recognizes that many freight rolling stock owners already have extensive experience using various types of reflective materials on the sides of their equipment in specific service environments. FRA recognizes that these owners understand the harsh conditions associated with railroad operations that may affect the performance of the retroreflective material, particularly the power washing of equipment or the extensive exposure of the equipment to various harsh chemicals. Accordingly, freight rolling stock owners electing to apply air encapsulated sheeting conforming to the requirements of this rule may wish to consider specifying that the material be edge sealed in order to limit maintenance costs.

As originally proposed, paragraphs (b) and (c) of this section generally required that the retroreflective sheeting meet the color and performance requirements, except for the photometric requirements, of the American Society of Testing and Measurements' (ASTM) Standard D 4956–01, *Standard*

[5] FRA notes that 3M refers specifically to ''enclosed lens sheeting'' in its comments. FRA understands that the term ''enclosed lens sheeting'' typically refers to ''glass bead'' type sheeting and FRA notes that no glass bead type sheeting currently being manufactured is capable of meeting the photometric performance requirements of FRA's proposed specification. However, from the remainder of 3M's comments specifically referring to ''[r]etroreflective sheeting that incorporates air between laminations,'' FRA assumes that 3M is referring to air encapsulated sheeting.

Specification for Retroreflective Sheeting for Traffic Control.[6] Although FRA has retained these general requirements in this final rule, the agency has revised both paragraphs (b) and (c) in response to comments received and to ensure clarity.

In paragraph (b) of this section, the NPRM proposed to require that retroreflective sheeting applied pursuant to this rule be yellow as specified by the chromaticity coordinates of ASTM standard D 4956–01. As detailed in the NPRM, FRA proposed to require yellow retroreflective material because the spectral measurement of the color (approximately 550 nm) is within the peak sensitivity range of the human visual system and accordingly, it is one of the most easily detectable colors under varying ambient light and other environmental conditions (*e.g.*, darkness, fog, haze, etc.). In addition, the color yellow minimizes the risk of motorist confusion with the colors of other roadway hazards (*e.g.*, red and white reflectors on trucks) and is not a color prevalent in most background environments.

FRA received a number of comments suggesting that white, not yellow, was the best color choice for retroreflective material on the sides of rail cars. Generally, commenters expressed the view that white is ''brighter'' and more reflective than yellow and therefore would be the most effective in increasing the conspicuity of rail cars. For example, AAR reasoned that ''[i]t would seem that reflectivity should be the criterion since the goal is to alert the motorist that there is something ahead and the most reflective material [white material] would have the greatest chance of achieving that objective.'' Another commenter, Mr. James R. Nimz, County Engineer for Seneca County, Ohio, commented that white will always appear the brightest of all color groups; accordingly, to maximize the effectiveness of the retroreflective sheeting, Mr. Nimz recommended the use of white material. Selecto-Flash, Inc., another manufacturer of reflective sheeting already in use in the railroad environment commented that many railroads with existing voluntary reflectorization programs have long been using white material, and the AAR indicated that yellow retroreflective material is more expensive than white material. Specifically, AAR indicated that 3M informed one of their members that yellow material would cost 27% more than white. Accordingly, AAR expressed the view that it did not make sense to require car owners to spend more money for less reflectivity. FRA agrees with AAR that freight rolling stock owners should not be required to pay more money for yellow material than white material, but based on information provided to FRA from various retroreflective material manufacturers, FRA understands that the costs to the end-users of both white and yellow retroreflective material are exactly the same.

Contrary to the views expressed by these previous commenters, however, prior to FRA's publication of the NPRM, 3M submitted comments to the docket recommending, in part, the use of a high-contrast colored corner cube retroreflective material with a spectral measurement within the peak sensitivity of the human visual system (*e.g.*, yellow/green). In these comments, 3M explained that the high-contrast color would aid nighttime visibility.

As discussed in detail in the NPRM, retroreflective material is rated in terms of the reflected light per unit area as contrasted with the light striking it (''specific intensity per unit area'' or ''SIA''). Although FRA acknowledges that the SIA of white retroreflective material is greater than that of the yellow material contemplated in the NPRM, research has consistently shown that an object's perceived brightness is modified by color information. Generally, research addressing the effects of the color of retroreflective material on the brightness of the material has proven that chromatic markings (red, orange, yellow, green, blue) will appear brighter than photometrically matched achromatic (white) markings in similar environmental conditions. This effect is known as the Helmholtz-Kohlrausch effect. Josef Schumann *et al.*, The University of Michigan Transportation Research Institute, *Brightness of Colored Retroreflective Materials,* Rpt. No. UMTRI–96–33 (Nov. 1996) (citing a 1955 study by A. Chapanis and R.M. Halsey). A copy of this 1996 study is in the docket of this proceeding (Document No. FRA–1999–6689–112). The Helmholtz-Kohlrausch effect increases as excitation purity (*i.e.,* color saturation) increases. The Helmholtz-Kohlrausch effect usually results in a U-shaped function of dominant wavelength, with the minimum brightness around the dominant wavelength for yellow. *Id.*

Although research relating to the Helmholtz-Kohlrausch effect dates back to at least 1955, in the late 1990's several researchers specifically investigated whether the color of retroreflective material affected the materials' ability to enhance conspicuity. For example, in 1996 two separate research teams performed field experiments to evaluate the effect of color on the perception of retroreflective materials. One study evaluated the effect of color on the perceived ''conspicuity'' of retroreflective materials, and another study evaluated the effect of color on the perceived ''brightness'' of retroreflective material. *See* James R. Sayer *et al.,* The University of Michigan Transportation Research Institute, *Effects of Retroreflective Marking Color on Pedestrian Detection Distance,* Rpt. No. UMTRI–98–8 (Mar. 1998) (citing The University of Michigan's 1996 study by Schumann *et al.* and W.H. Venable and W.N. Hale's 1996 study titled *Color and nighttime pedestrian safety markings*). A copy of this 1998 study is in the docket of this proceeding (Document No. FRA–1999–6689–113). Both the studies cited in the 1998 study concluded that standard photometric measurements by themselves do not accurately predict the perception of colored retroreflective targets, particularly at nighttime, and that chromatic retroreflective stimuli were perceived to be brighter than photometrically matched achromatic stimuli.

As detailed in the 1996 University of Michigan study, W.H. Venable and W. N. Hale, in their 1996 study performed a field experiment based on night conspicuity judgments of chromatic versus achromatic markings and calculated a color correction factor (F_c) as the ratio of the luminance of an achromatic marking (L_a) to the luminance of any equally conspicuous chromatic marking (L_c) ($F_c = L_a/L_c$). Their results followed a U-shaped function expected from the Helmholtz-Kohlrausch effect, with higher conspicuity values (*i.e.*, higher color correction factors (F_c)) for red and blue, and the lowest value for yellow. Venable and Hale then mathematically derived F_c values for each color using two different methods: (1) Calculating F_c as the color difference from black in uniform color space, and (2) calculating F_c as recommended in ASTM International's Standard E–1501,

[6] ASTM has recently revised this standard and assigned it a new designation of D 4956–01a. Although the designation of the standard has changed, no substantive changes were made that would affect the performance of the material as contemplated by this rule. Accordingly, this final rule incorporates the latest version of the standard (D 4956–01a). Also, FRA notes that ASTM's full name was changed from ''American Society of Testing and Measurements'' to ''ASTM International'' in 2001. FRA, however, erroneously referred to ASTM International by its historical name, ''American Society of Testing and Measurements'' in the proposed rule. Accordingly, § 224.103 of this final rule reflects ASTM's correct name, ASTM International.

Standard Specification for Nighttime Photometric Performance of Retroreflective Pedestrian Markings for Visibility Enhancement (ASTM E–1501).[7] The two approaches resulted in almost identical F_c values (R^2=.99) for the different colors and the comparison of the Venable and Hale's calculated F_c values using the recommendation from ASTM E–1501 demonstrated a relatively good fit (R^2=.62). For a more detailed discussion of Venable and Hale's 1996 research, see document number FRA–1999–6689–113 in the docket of this proceeding.

The University of Michigan's 1996 study analyzing the effect of color on perceived ''brightness'' of retroreflective materials (as opposed to the Venable and Hale study which focused on the effect of color on the perceived ''conspicuity'' (*i.e.,* detectability) of retroreflective materials) yielded results similar to Venable and Hale's study. Specifically, using five chromatic stimuli and one achromatic stimulus, two levels of retroreflective power, two levels of area, and two levels of ambient illumination, Schumann employed magnitude estimation to gather subjective assessments of perceived brightness for colored retroreflective material. Similar to Venable and Hale's methodology, Schumann mathematically derived F_c values for each color tested and then compared these mathematically derived F_c values with F_c values calculated as recommended in ASTM E–1501. As did Venable and Hale, Schumann reported a very high correlation between the calculated and experimentally obtained color correction factors (R^2=0.94). Further, Schumann used the experimental color correction factors identified in Venable and Hale's 1996 study and arrived at similar results.

In 1998 researchers at the University of Michigan Transportation Research Institute conducted a nighttime field study to assess the effects of color on the detection of retroreflective markings. *See* Document No. FRA–1999–6689–113 in the docket of this proceeding. This field study again demonstrated that the color of retroreflective markings does affect the distance at which the markings can be detected. Specifically, the three chromatic retroreflective markings examined (red, yellow, and green) were detected at significantly farther distances, 7% to 10% farther than the achromatic (white) retroreflective markings and the study concluded that for white markings to be detected at the same distance as chromatic markings (*e.g.*, red, yellow, or green markings), white markings would need to have a 26% to 44% higher SIA value than the yellow markings (or the white markings would need to be significantly larger than the yellow markings). In other words, the nighttime detection of colored retroreflectors cannot be predicted from photometric measurements alone; chromaticity must also be considered. Sayer *et al.* (Document No. FRA–1999–6689–113 in the docket of this proceeding.)

As detailed in the preamble to the NPRM, FRA's own research regarding the effectiveness of freight car reflectorization yielded similar results. Specifically, FRA's research consistently found that retroreflective patterns of yellow markings were the most effective in enhancing the visibility of freight cars. *See Evaluation of Retroreflective Markings to Increase Rail Car Conspicuity,* Project Memorandum, DOT–VNTSC–RR897–PM–98–22, John A. Volpe National Transportation Systems Center (Oct. 1998) (1998 Volpe Report). Accordingly, FRA continues to believe that yellow retroreflective sheeting is the best color choice for retroreflective material on the sides of freight rolling stock. Nonetheless, FRA recognizes that white retroreflective material can perform satisfactorily. *See* 1998 and 1999 Volpe Reports.

Accordingly, recognizing that many railroads and car owners have already begun voluntary reflectorization programs using white material and that white retroreflective material has been determined to be effective in increasing the visibility of rail cars, FRA has revised paragraph (b) in this section of the final rule to allow the use of either white or yellow retroreflective material.[8]

In the NPRM, FRA specifically noted that its own research determined that fluorescent yellow retroreflective material had the highest SIA value of all materials tested and that fluorescent yellow material could be detected from a farther distance than any other material tested. However, based on our understanding that the duration of fluorescent pigments is substantially less than the typical ten-year reflector product guarantee, the agency proposed not to require the application of retroreflective material with fluorescent properties. In its comments, however, 3M, pointed out that its fluorescent yellow sheeting typically used on traffic signs is warranted for a full ten years. Further, 3M explained that the duration of fluorescent pigments is affected by the direction of the fluorescent material's exposure (presumably due to ultraviolet rays from the sun) and reasoned that because rail cars do not always face the same direction, the expected life of fluorescent yellow pigments would exceed the expected durability of the markings. Accordingly, 3M recommended that FRA require the use of fluorescent retroreflective material. Avery Dennison, on the other hand, commented that because fluorescent objects absorb ultraviolet light from the sun and then re-emit longer wavelength light, fluorescent colors are most effective in increasing daytime conspicuity. However, Avery Dennison noted that since the sun does not emit ultraviolet light at night, fluorescence stops. Accordingly, Avery Dennison reasoned that because the stated purpose of the rulemaking is to increase nighttime conspicuity, fluorescent colors would add no value to the application. Further, Avery Dennison explained that fluorescent colors are specified by their exceptionally high daytime luminance factors (Y%) and that such a specification would eliminate the use of metalized prismatic materials. Further, Avery Dennison commented that if metalized prismatic materials were eliminated from suitability under this rule, this would only allow two current conspicuity tape manufacturers to supply the market. FRA agrees with Avery Dennison on this point, and accordingly, this final rule does not require fluorescent retroreflective material. However, as noted in the preamble to the NPRM, if a fluorescent retroreflective material meets all of the requirements of this part, its use is acceptable.

Although in its comments to the NPRM, Avery Dennison expressed general agreement with FRA's proposal to require yellow retroreflective material, Avery Dennison noted one ambiguity in the proposed color requirement. Specifically, Avery Dennison pointed out that ASTM standard D 4956–01 contains three yellow color standards, all referencing the same chromaticity coordinates, but with three different daytime luminance

[7] Recognizing that a chromatic retroreflector may appear brighter than an achromatic retroreflector with the same luminance, ASTM E–1501 provides a widely-accepted methodology for calculating color correction factors which effectively account for the perceived difference in brightness between chromatic and achromatic retroreflective markings.

[8] FRA notes, however, that because chromatic markings (*e.g.,* yellow markings) generally appear brighter and more detectable than similarly-sized achromatic markings (*i.e.,* white markings), if white material is applied to rail cars under this rule, it is necessary to apply a greater quantity of the material to achieve the same effectiveness as a smaller quantity of yellow material. This ''color correction factor'' is discussed in more detail in the discussion of § 224.105 below.

factors (*i.e.,* Tables 5, 9, and 11 of the ASTM standard). Avery Dennison explained that based on the chromaticity coordinates specified in the ASTM standard, if FRA does not specify a minimum daytime luminance factor, retroreflective sheeting that appeared brown could meet the stated color requirement. Accordingly, Avery Dennison recommended that FRA adopt a minimum daytime luminance factor (Y%) of 12 for yellow sheeting. Although FRA now recognizes this ambiguity in the color requirement of the proposed rule, in this final rule FRA has modified the performance requirements contained in paragraph (c) to specify that retroreflective sheeting applied pursuant to this rule must meet the performance requirements (except for the minimum photometric performance requirements) of Type V Sheeting as defined in ASTM standard D 4956–01a. One of the performance requirements of Type V Sheeting is meeting an assigned daytime luminance factor. Specifically, Table 11 of the ASTM standard sets forth the required Y% for Type V Sheeting; the Y% for yellow Type V sheeting is 12, and the Y% for white Type V sheeting is 15. Accordingly, although FRA agrees with Avery Dennison's comment regarding the necessity of including a daytime luminance factor to ensure that only appropriately high-contrast colored sheeting meets the performance requirements of the rule, FRA has achieved this by specifying that sheeting must meet the requirements for Type V Sheeting as defined in ASTM standard D 4956–01a.

Paragraph (c), as it did in the NPRM, contains the performance standards for retroreflective sheeting applied under this part. This paragraph, however, has been modified slightly, consistent with FRA's decision to allow the use of either yellow or white retroreflective material and to clarify the performance requirements. As discussed above and explained in detail in the NPRM, this paragraph was intended to require that retroreflective sheeting applied in accordance with the rule meet all the performance requirements, except for the minimum photometric performance requirements, of ASTM standard 4956–01. The ASTM standard has been chosen as the basis for the FRA specification because FRA understands it to be the specification that manufacturers of retroreflective sheeting are following in their current manufacturing process. NHTSA's rule requiring reflectorization of large truck trailers (49 CFR 571.108) is also based on this ASTM standard (version D 4956–01).

As proposed, however, these performance requirements contained a certain amount of unintended ambiguity. Specifically, ASTM standard D 4956–01a identifies nine ''Types'' of retroreflective sheeting. As explicitly stated in the ASTM standard, ''Type designation is provided as a means for differentiating functional performance.'' ''Types'' are determined by conformance to the standard's retroreflectance, color, and durability requirements. Each ''Type'' designated by ASTM must conform to certain minimum performance standards. That is, each ''Type'' must meet certain performance standards (*i.e.,* retroreflective photometric performance, flexibility, adhesion, impact resistance, accelerated weathering, shrinkage, resistance to fungus, and specular gloss performance standards). Because no ''Type'' was specified in the performance requirements of paragraph (c) of proposed § 224.103, it was impossible for the retroreflective material manufacturing industry to determine which performance standards specified in the ASTM standard FRA intended to apply.

In this final rule, FRA has clarified these performance requirements by stating that retroreflective sheeting must conform to all the performance requirements, except the minimum photometric performance requirements, for Type V Sheeting as defined in ASTM standard D 4956–01a. Type V Sheeting, defined in the ASTM standard as ''super high-intensity retroreflective sheeting,'' is typically used for delineators. For example, Federal regulations requiring retroreflective material on the sides and rear of large trucks require retroreflective sheeting meeting the performance requirements of Type V Sheeting. Although FRA did not specify ''Type V'' sheeting in the proposed rule, FRA believes doing so now is consistent with the proposed rule because, given the photometric performance requirements contained in the NPRM, the other ASTM-defined ''Types'' of sheeting that could meet the proposed performance requirements would not be appropriate for the intended function of delineators on rail car sides.

As explained in the NPRM, because FRA is requiring that retroreflective sheeting meet the requirements of ASTM D 4956–01a for Type V Sheeting only as initially applied and is not requiring specific minimum reflectivity for vehicles in service, FRA believes that highly durable sheeting meeting the performance tests of the ASTM standard is required. It is less costly to install durable material than it would be to install less durable material but be required to regularly test its performance relative to a performance standard.

Table 1 of the final rule, as it did in the proposed rule, sets forth the specific minimum photometric performance requirements for retroreflective sheeting under this part. In addition, because the final rule permits the use of either yellow or white material (as opposed to the proposed rule which contemplated the use of only white material), FRA has inserted the minimum photometric performance requirements (*i.e.*, minimum SIA) in Table 1 specific to white material.[9] Specifically, Table 1 sets forth the minimum photometric performance requirements (*i.e.*, minimum required SIA) for both yellow and white retroreflective material at observation angles of 0.2° and 0.5° and light entrance angles of −4° and 30° based on typical grade crossing configurations and the standards set forth in ASTM D 4956–01a. These minimum photometric performance requirements for white material, like the requirements applicable to yellow material proposed in the NPRM, were developed to ensure that the retroreflective material would perform above the minimum detection threshold of 45 cd/fc/ft^2 identified in the 1999 Volpe Report as necessary to enable most motorists to detect a train in time to avoid a collision. As explained in the NPRM, FRA recognizes that in the real world railroad operating environment, the effective SIA of retroreflective materials depends on various factors (*e.g.*, grade crossing configurations and angles, ambient light conditions, vehicle headlight type and lens cleanliness, weather, and the presence and working condition of illumination and other warning devices). FRA also recognizes that the effectiveness of the retroreflective material may be reduced because of dirt and grime which inevitably accumulate on rail cars. Accordingly, as in the proposed rule, the minimum photometric performance requirements of this final rule take into account these varying factors. Specifically, as explained in the NPRM, in determining these minimum

[9] In the NPRM, FRA specifically requested comments regarding these minimum photometric performance requirements for white material. 68 FR 62955. Because FRA received no substantive comments regarding these requirements, FRA has adopted them substantially as proposed in this final rule. FRA has, however, corrected one inadvertent error in the requirements as previously published. In the NPRM, FRA erroneously referred to an observation angle of 0.53 for white material. FRA has corrected this error to maintain consistency with ASTM standard D 4956–01a in this final rule.

photometric performance requirements, FRA extrapolated test data detailed in the 1999 Volpe Report out ten years, the manufacturer's stated useful life of the material. This extrapolation demonstrated that the forecasted SIA levels remained well above the minimum detection level established in the 1999 Volpe Report. In addition, although the primary degradation in the SIA of the material occurs during the first two years as a result of ultra-violet light exposure, after which the material maintains a relatively consistent intensity throughout its useful life, FRA forecasted SIA degradation of the material due to dirt and grime accumulation exponentially. Accordingly, FRA's analysis substantially overestimates the degradation rate of the material, and even with this overestimation, the expected SIA values for 10 years remain well above the minimum detection level identified in the 1999 Volpe Report.

In response to the minimum photometric performance requirements of the proposed rule, 3M recommended that the 30° entrance angle be increased to 40° and the minimum photometric performance requirements be revised accordingly. Specifically, 3M questioned whether the 4% of crossings FRA identified with crossing angles of less than 30° assume that drivers view trains while they are on the road that crosses the track (*e.g.*, driving on a road perpendicular to the tracks). 3M pointed out that drivers are often on a roadway parallel to railroad tracks and, given the narrow entrance angularity of the proposed photometric requirements, 3M expressed the view that drivers often would not have enough time after turning off a parallel roadway to react to conspicuity markings on railcars passing on the track. Avery Dennison, on the other hand, commented that if a driver were traveling on a roadway parallel to the tracks, the driver would have to make a 90° turn, requiring braking, in order to cross the tracks. Accordingly, Avery Dennison concluded that the proposed entrance angle requirements were sufficient.

As explained in the NPRM, FRA's Grade Crossing Inventory demonstrates that approximately 80% of all crossings have crossing angles between 60° and 90°, almost 17% have crossing angles between 30° and 59°, and only 4% have crossing angles less than 30°. Accordingly, the requirements of Table 1 ensure that the retroreflectors will perform above the minimum detection threshold for the average motor vehicle at approximately 96% of all crossings.

Paragraph (d) of this section retains the certification requirement proposed in the NPRM. Specifically, manufacturers of retroreflective sheeting are responsible for compliance with the construction, color, and performance requirements of the retroreflective sheeting used to comply with this rule. Accordingly, as it did in the NPRM, this paragraph requires that manufacturers who are providing retroreflective sheeting to the railroad industry certify their products' compliance with § 224.103. Specifically, paragraph (d) requires that the characters ''FRA–224'' be permanently stamped, etched, molded, or printed, in characters at least 3 mm high, with each set of characters spaced no more than four inches apart, on each piece of retroreflective sheeting manufactured. FRA received only two comments regarding the proposed certification requirement, both from manufacturers of retroreflective sheeting. First, 3M suggested that the integrity of the self-certification system proposed needed improvement and urged FRA to require manufacturers to demonstrate compliance with the ISO 9000 Quality Systems Standard or a technically equivalent standard. Avery Dennison, on the other hand, expressed the view that the certification requirement, as proposed in the NPRM, was adequate. In support of its position, Avery Dennison noted that the proposed self-certification requirement of an indelible ''FRA–224'' mark is identical to the self-certification requirement in the Federal Motor Vehicle Safety Standards requiring retroreflective sheeting on large trucks and trailers (49 CFR 571.108). FRA notes that the manufacturer self-certification system proposed was modeled after the system utilized in the trucking industry. Also, FRA notes that the same retroreflective material manufacturers who supply material to the trucking industry will be the suppliers pursuant to this rule. Accordingly, FRA believes that the system of self-certification, as proposed, is sufficient.

Paragraph (e) of this section, which has not changed from that proposed in the NPRM, recognizes that although the rule generally requires application of retroreflective sheeting meeting the specific construction, color, and performance requirements of § 224.103(a) through (c), freight rolling stock owners may, under § 224.15, request FRA approval to use alternative standards. As discussed in the analysis of § 224.15 above, any alternative standard utilized must result in an equivalent level of safety as the sheeting described in § 224.103(a) through (c) applied in accordance with this rule.

Section 224.105 Sheeting Pattern, Dimensions and Quantity

As proposed in the NPRM, § 224.105 made the amount and placement of retroreflective sheeting required under this part dependent on the size of the car or locomotive, as well as the car type. Proposed § 224.105 also set forth specific patterns for the application of retroreflective material to various types of freight cars, as well as locomotives. This section of the final rule, however, no longer sets forth specific placement patterns for freight cars and locomotives. Instead, this section now describes the general standards for the pattern of retroreflective material application for rail cars, dimensions of individual pieces of retroreflective sheeting, and the minimum quantity of retroreflective sheeting required on each side of a freight car or locomotive. A new section, § 224.106, sets forth the more specific patterns, applicable to both freight cars and locomotives, that FRA is requiring in this final rule. Accordingly, discussion of the specific patterns of application required for freight cars and locomotives will be discussed in the analysis of new § 224.106, and the discussion in this section will focus on the general requirements of § 224.105 as adopted in this final rule.

As contemplated by the proposed rule, this section of the final rule specifies that, with certain exceptions, individual reflectors applied pursuant to this part must be 4 inches wide and 18 or 36 inches long (one-half a square foot or one square foot, respectively). FRA has retained this general requirement for relatively large-sized reflectors in order to minimize the degradation rate of individual strips of retroreflective sheeting. Section 224.105 of this final rule also provides that retroreflective sheeting must be applied along the length of freight car and locomotive sides and that the amount of retroreflective material required to be applied is, in part, dependent on the length of the car or locomotive. Table 2 of this section mandates a minimum square footage of sheeting on each car side, based on the car size and the sheeting color. If a car owner or railroad chooses to apply yellow retroreflective material, the amount of material required is consistent with the minimum amounts proposed to be required on ''cars of special construction'' in § 224.105(a)(4) of the proposed rule. As discussed in the NPRM, although the optimum configuration of retroreflectors identified in the 1999 Volpe Report required slightly less retroreflective

material, this configuration assumed that the material would be periodically washed. Volpe found that periodic washing of the retroreflectors could recover the intensity of the prismatic material to nearly original levels. However, because of practical concerns expressed by many members of the railroad industry (*e.g.*, increased labor costs, environmental wastewater, and water usage issues), FRA is not requiring the periodic cleaning of the retroreflective sheeting. Instead, in order to compensate for the lack of cleaning, FRA is requiring approximately 30% more material (about 1 square foot on each side of most typically-sized freight rolling stock), thereby lowering the level of luminance needed.

As noted in the discussion of § 224.103 above, if a car owner or railroad chooses to apply white retroreflective material for purposes of meeting the enhanced visibility standards of this final rule, the owner must apply a greater quantity of the material in order to achieve the same effectiveness as the smaller quantity of yellow material required by this rule. As also noted above in the discussion of the color requirement of § 224.103, although white material has a higher SIA than yellow material, and presumably would be brighter and more reflective than yellow material, because an object's perceived brightness is modified by color information, yellow is actually more detectable, particularly at night and during other conditions of limited visibility. *See* Schumann *et al.* and Sayer *et al.* (Document Nos. FRA–1999–6689–112 and –113 in the docket of this proceeding).

As noted in the discussion of § 224.103 above, recognizing that a chromatic retroreflector may appear brighter than an achromatic retroreflector with the same luminance, ASTM E 1501 provides a widely-accepted methodology for calculating color correction factors which effectively account for the perceived differences in brightness and conspicuity between chromatic and achromatic retroreflective markings. Based on the chromaticity coordinates of their specific product colors and the methodology of ASTM E 1501,[10] manufacturers of retroreflective sheeting calculate color correction factors specific to their product colors. As a result, manufacturer-specific tables of color correction factors for retroreflective traffic control products that compensate for color have existed in the reflective material manufacturing industry for decades. Based on the color correction factors reported by a sampling of retroreflective material manufacturers already routinely supplying retroreflective material to the railroad industry and the methodology of ASTM E 1501, FRA determined that approximately 24% more white retroreflective material meeting the minimum photometric performance requirements of § 224.103 is necessary to achieve the same level of retroreflection as the amount of yellow material FRA determined to be necessary.

Section 224.106 Location of Retroreflective Sheeting

As noted in the discussion of § 224.105 above, similar to proposed § 224.105, § 224.106 of this final rule sets forth specific patterns for the application of retroreflective material to various types of freight cars, as well as locomotives. The proposed rule (in § 224.105) generally required a vertical pattern of retroreflective sheeting on the sides of freight cars, with strips of sheeting to be located as close to each end of the car as practicable and at equidistant intervals of not more than 10 feet. FRA proposed to require that retroreflective sheeting be applied at least every 10 feet along the sides of freight cars because roadway lanes in the United States are typically 10 to 12 feet wide and accordingly, having at least one reflector every 10 feet increases the likelihood of a reflector being in the sight path of an approaching motorist. Recognizing that the conspicuity issues surrounding locomotives differ from the issues surrounding freight cars, § 224.105 of the proposed rule provided a more flexible approach to the reflectorization of locomotives, specifying only that a minimum amount of retroreflective material was to be equally distributed between both sides of locomotives in a pattern recognizable to motorists.

Railroad Freight Cars

As proposed in the NPRM, paragraph (a) of § 224.105 set forth a specific pattern of application for railroad freight cars generally (*e.g.*, box cars, gondola cars, and other similarly configured cars), tank cars, flat cars, and ''cars of special construction.'' Specifically, as proposed, paragraph (a) explained that the amount of retroreflective sheeting required to be applied to freight cars under this part is dependent on the length of the car, measured from endsill to endsill, exclusive of the draft gear. Paragraph (a)(1) proposed to require that on freight cars other than tank cars, flat cars, and ''cars of special construction,'' retroreflective sheeting be applied vertically in 4x36 inch and 4x18 inch strips along the car sides, with the bottom edge of each strip as close as practicable to 42 inches above the top of the rail. Further, paragraph (a)(1) proposed to require that either a minimum of one 4x36 inch (one square foot) strip of retroreflective material or two 4x18 inch strips, directly above the other, be applied vertically as close to each end of the car as practicable and that a minimum of one 4x18 inch strip be applied vertically at equal intervals of 10 feet or less between the car ends.

Paragraphs (a)(2) and (3) of proposed § 224.105 followed the same basic pattern as paragraph (a)(1), but attempted to account for the configurational differences between various types of freight cars. Proposed paragraph (a)(2) addressed tank cars, while paragraph (a)(3) addressed flat cars. Paragraph (a)(2) proposed to require that on tank cars, retroreflective sheeting be applied vertically along the car sides and centered on the horizontal centerline of the tank, or as near as practicable. Further, proposed paragraph (a)(2) provided that if it was not practicable to safely apply the sheeting centered on the horizontal centerline of the tank, the sheeting could be applied vertically with its top edge no lower than 70 inches above the top of the rail. Similar to the pattern proposed in paragraph (a)(1), paragraph (a)(2) proposed to require a minimum of one 4x36 inch (one square foot) strip of retroreflective material or two 4x18 inch strips, directly above each other, be applied vertically as close to each end of the tank as practicable and that a minimum of one 4x18 inch strip be applied vertically at equal intervals of 10 feet or less between each end of the tank. The intent of this proposed configuration of reflective material on tank cars was that the retroreflective sheeting would be centered, as practicable, on the outermost curved areas of the tank, thereby reflecting the most light.

Recognizing the limited surface area of the sides of a typical flat car, paragraph (a)(3) of proposed § 224.105 required a minimum of two 4x18 inch strips, one next to the other, be applied vertically as close to each end of the car as practicable, with the bottom edge of each strip no lower than 30 inches above the top of the rail, as practicable. Consistent with the application pattern for other freight cars, paragraph (a)(3) further proposed to require that a minimum of one 4x18 inch strip be applied to the sides of flat cars vertically at equal intervals of ten feet or less, with

[10] *See* §§ 6.4 and 6.5 of ASTM E 1501 addressing Chromaticity Coordinates and Color Factor for Adjustment Calculations (F_c).

the bottom edges of each strip no lower than 42 inches above the top of the rail, as practicable. Because the surface area of the sides of a typical flat car is between 4 and 18 inches in height, paragraph (a)(3) provided that if vertical application of 4x18 inch strips was not feasible, sheeting could be applied vertically in three 4x6 inch strips placed horizontally along the side sill of the cars.

Paragraph (a)(4) of proposed § 224.105 recognized that not all freight cars would fit the standard configurations contemplated in paragraphs (a)(1) through (a)(3) and proposed a more flexible pattern for these ''cars of special construction.'' FRA estimated that the patterns proposed for typical freight cars, tank cars, and flat cars would be impractical to apply to approximately 1% of the fleet due to their unique physical configurations. Specifically, based on the length of a ''car of special construction,'' this paragraph proposed to require a specific amount of retroreflective material be applied to these cars in a pattern conforming ''as close as practicable'' to the standard patterns proposed in paragraphs (a)(1) through (a)(3).

The intent of the specific patterns specified in proposed § 224.105(a) was to maximize the effectiveness of the retroreflective material, allow retroreflectorization of a variety of freight car types with the same generally recognizable pattern, and also to minimize the degradation rate of the material. Specifically, as detailed in the NPRM, FRA proposed to require a vertical pattern of retroreflective material for several reasons. First, FRA's own research indicated that either a pattern that outlined the shape of the rail equipment, or a vertically-oriented pattern that spaced retroreflective material uniformly over a large area of the equipment's side was most effective in increasing the visibility of the equipment. Second, a vertically-oriented pattern contrasts with the horizontally-oriented pattern of the retroreflective material required for truck trailers, thereby reducing the likelihood that motorists will confuse a train in a grade crossing with a truck trailer. Third, because not all approaches to grade crossings are level (''humped crossings''), to the extent that a motor vehicle's headlights are aimed away from the retroreflective material, less light will reach the retroreflective material if it is applied horizontally; therefore, less light will be returned to the driver, and a train in a crossing will be more difficult to detect. Accordingly, FRA reasoned that orienting the retroreflective material vertically increases the likelihood that the maximum available light from vehicle headlights will enter the retroreflective material and be returned to the motorist when the road is not level.

A few commenters, including the AAR and CN, expressed the view that FRA's rationale underlying the proposed vertical pattern is flawed because the ability of motorists to distinguish between trucks and rail rolling stock is not a real concern. For example, CN noted that grade crossing signage and other crossing warning devices indicate the closeness of a railroad crossing to a driver. These cues, along with the ''presence of any sort of object ahead,'' CN reasoned, ''should be enough for a prudent driver to take the necessary precautions.'' FRA notes, however, that the prevalence of unlighted, passively-protected crossings throughout the United States often makes grade crossing signage and similar warning devices difficult for motorists to detect, especially during conditions of limited visibility.

AAR asserted that the fact that there is considerable traffic on the rails that must have reflectorized material meeting highway specifications further undermines FRA's conclusion that it is important for motorists to be able to distinguish between trucks and trains in their path of travel. Further, AAR asserted that regardless of whether a motorist perceives a truck or a train ahead in his or her path of travel, the motorist must react the same way—*i.e.,* the motorist must determine whether there is any trailing traffic. Accordingly, AAR expressed the view that if a motorist mistakes railroad rolling stock for a truck, or vice versa, the mistake should be of no consequence.

In these comments, however, AAR does not consider the fact that any trailing traffic following a truck would more than likely be another reflectorized highway vehicle, or at least, a highway vehicle equipped with headlights and taillights; thus, any traffic trailing a truck would be easily detected by an approaching motorist. If a motorist perceives a truck in his or her path, but no traffic trailing the truck, he or she may only need to slow the vehicle to avoid a collision, since trucks are generally shorter than trains, normally move through intersections faster than trains, and usually do not have any hard-to-detect trailing traffic. However, given the prevalence of non-reflectorized rail cars, and the 10-year implementation period for reflectorization of rail freight rolling stock contemplated by the proposed rule and adopted in this final rule, it is highly likely that any traffic trailing a reflectorized rail car would be a non-reflectorized rail car. Thus, if a motorist perceives a reflectorized rail car in his or her lane of travel, the motorist must react differently than if he or she perceives a truck with no trailing traffic, not only because trains are generally longer than trucks and pass through intersections slower than trucks, but also because of the likelihood of hard-to-detect trailing traffic. Accordingly, FRA continues to believe it important that any rail car reflectorization pattern minimize, to the extent possible, the potential for motorist confusion between trains and trucks. However, even disregarding the issue of potential motorist confusion between reflectorized rail cars and reflectorized trucks, because research has shown that a vertically-oriented pattern spacing retroreflective material over the length of rail car sides is one of the most easily detectable patterns of retroreflective material and because a vertically-oriented pattern ensures that the maximum available light from vehicle headlights will enter the retroreflective material and be returned to an approaching motorist, FRA continues to believe that a vertical reflectorization pattern is the most effective in increasing the visibility of freight cars.

FRA recognizes, however, that AAR and several commenting railroads, many of which already have successful voluntary freight car reflectorization programs in place, noted significant practical difficulties with the vertical pattern FRA proposed. In particular, FRA received a multitude of comments asserting that the proposed vertical ''striping'' pattern was impracticable for the majority of freight cars that would be subject to the rule and that the proposed rule did not provide enough flexibility as to where retroreflectors could be applied pursuant to the rule. For example, CP, which has had a voluntary reflectorization program in place for several years, commented that although it had no objection to FRA's proposed square footage requirements, any reflectorization standard ''should provide sufficient latitude for application to various car types, particularly when applying [reflective material] to existing cars where existing stencil requirements have to be taken into account.'' More specifically, comments submitted by various members of the railroad industry consistently expressed the view that FRA's proposed pattern of vertical striping posed three major problems. First, commenters asserted that given the physical configurations of many freight cars, it would be physically

impossible to apply material in the proposed pattern on the majority of freight cars that would be subject to the rule. Second, these commenters asserted that FRA's proposed pattern would interfere with reporting marks and other stencils on freight cars, as well as bolts, rivets and other discontinuous surfaces on the face of freight cars. Third, these commenters asserted that on many cars, safety appliances would obscure or otherwise interfere with the proposed striping pattern.

At the January hearing, TTX, an owner of one of the nation's largest fleets of railcars, stated that in most cases, and particularly with regard to flat cars, it would be ''physically impossible'' to comply with FRA's proposed reflectorization pattern. Specifically, TTX noted that none of its ''conventional'' flatcar fleet has sides high enough to accommodate reflectors at 42 inches from the top of the rail; that none of its conventional flatcars could accommodate vertical reflectors at the ends; and that because of existing car markings, fasteners, and other appurtenances, few of its conventional flatcars could accommodate evenly spaced reflectors. Further, TTX noted that the same problems are even more pronounced with some of its specialized pieces of equipment (*e.g.,* centerbeam cars, bulkhead flatcars, and heavy duty flatcars) which have ''extremely narrow sills and almost no space at the ends.'' In its comments, TTX asserted that FRA should not issue a rule requiring the reflectorization of flat cars that nearly all flat cars could not meet. TTX asserted that ''[i]f there is a rule designed specifically for flatcars, it should recognize the universal low height of the cars, the fact that they have very little surface area for affixing the reflectors, and the fact that they have little vertical space at the ends.''

In response to TTX's particular concerns regarding the proposed pattern of retroreflective sheeting on flat cars, FRA notes several points worthy of clarification. First, in paragraph (a)(3) of proposed § 224.105, FRA specifically recognized the limited surface height of the sides of typical flat cars and provided that if vertical application of retroreflective sheeting was not feasible on a particular car, sheeting could be applied in 4x6 inch strips placed horizontally along the side sills. In addition, proposed paragraph (a)(3) of this section required that retroreflective sheeting be applied no lower than 30 or 42 inches above the top of the rail, ''as practicable.'' In other words, FRA intended to provide the flexibility necessary to accommodate flat cars with narrow side sills.

TTX did recognize FRA's attempt to account for the physical configurations of ''odd-shaped'' cars by providing for ''cars of special construction'' (*i.e.,* not typically-shaped freight cars, tank cars, or flat cars) in proposed paragraph (a)(4) of this section. However, TTX expressed the view that the proposed requirement that the retroreflective pattern on these ''cars of special construction'' conform as close as practicable to the standard patterns proposed for typical freight cars presented additional problems in that it would require an owner's maintenance and repair personnel to exercise their judgment in the field as to what reflector configuration would conform ''as close as practicable'' to FRA's stated standards. TTX expressed concern that, given the wide variety of existing car types and physical configurations, along with the varying car markings, stencils, and appurtenances on each different car type, it would be impossible to ensure that every physical variation of these ''cars of special construction'' was equipped with retroreflectors in a standardized way, conforming as close as practicable to FRA's stated standards. Finally, TTX expressed concern that many cars have insufficient unoccupied side surface area to meet even FRA's minimum square footage requirements for retroreflective sheeting, much less the specific location requirements.

At the January hearing, a representative of ARC (an organization of suppliers, particularly rail car builders) expressed concerns similar to TTX's, but regarding boxcars. Specifically, ARC expressed the view that even on a typical boxcar, given the stenciling required by AAR Standard S910–98, there is little room for placing vertical reflectors without interfering with the car's stenciling. Other commenters noted that the corner posts of railcars are typically less than four inches wide; thus, it would be impossible to apply four-inch wide retroreflective markings at the extreme ends of many railcars. API, along with ARC, echoed TTX's concern regarding the proposed rule's requirement for evenly spaced reflectors. Specifically, API explained that if no more than 10 feet is allowed between strips of reflective sheeting, the reflective markings will interfere with car stencils. RSI noted that placement of retroreflective sheeting, as proposed, may require the restenciling of many cars, adding significantly to the cost of application. AAR expressed similar comments and provided drawings showing how FRA's proposed vertical application pattern would purportedly interfere with existing car stenciling.

AAR also asserted that on many cars, safety appliances would interfere with the proposed vertical striping pattern and that in many cases, the proposed vertical striping pattern would require that a retroreflective strip be placed under a safety appliance (such as a handhold, grab iron, or ladder), which would interfere with the visibility of the reflectorized material. In addition, AAR asserted that maintenance of safety appliances in close proximity to reflectorized material could cause damage to the reflectorized material and that FRA's proposed vertical striping pattern did not account for potential damage caused by employees inadvertently kicking and scraping reflectorized material as they get on and off a safety appliance.

Commenters suggested a far more flexible approach in the application of retroreflective material to the sides of rail cars. For example, at the January hearing, TTX suggested that car owners simply be required to equip their cars with a certain amount of retroreflective sheeting in a generally uniform way, taking into account the particular existing structure of the car. RSI recommended that FRA allow vertical, horizontal, or a combination of both patterns; CP, CN, and AAR recommended a horizontal pattern on most car types; and API recommended a spacing of 8–12 feet between reflectors. Many commenters also endorsed AAR's proposed industry standard and suggested that FRA incorporate the standard in any final rule on reflectorization.

Although, based on its extensive research efforts, FRA continues to believe that a vertically-oriented reflective pattern, uniformly spread along the length of car sides, is the most effective in increasing the visibility of rail cars, FRA recognizes the practical concerns expressed by commenters and that in many cases, a vertical pattern of retroreflective material along the sides of freight cars is not feasible. FRA also recognizes that research has also shown that generally, a reflectorized freight car is significantly more detectable than an unreflectorized car, whether the reflective material is applied horizontally or vertically, or whether the reflective material is yellow or white. *See* 1998 and 1999 Volpe Reports. In addition, in the proposed rule, FRA did not intend that freight cars would have to be restenciled in order for retroreflective material to be applied. FRA also based the proposed rule on the belief that the pattern proposed for typical freight cars, tank cars, and flat cars would be practical to apply to approximately 99% of the

freight car fleet. Comments received in response to the NPRM, however, indicate that this belief is inaccurate. Accordingly, in this final rule, FRA has revised the required retroreflective material placement patterns applicable to freight cars to alleviate the practical concerns noted by several commenters. Section 224.106 of this final rule also specifically invites the industry to revise the industry standard proposed by AAR to meet the performance requirements of this final rule. Absent the industry's development and FRA's acceptance of an industry standard for the reflectorization of freight cars and locomotives, § 224.106 of this final rule sets forth specific patterns for the application of retroreflective material to various types of freight cars, as well as locomotives.

Generally, in this final rule FRA has revised three basic aspects of the patterns contemplated in proposed § 224.105. First, FRA has revised the required patterns to provide for flexibility in applying the sheeting around existing and required stenciling and markings, around appurtenances which may obscure the visibility of the sheeting, and around discontinuous surfaces that may prevent the sheeting from adhering to car sides. Second, FRA has revised the required patterns, where appropriate, to provide for either vertical or horizontal placement of retroreflective sheeting. Third, FRA has eliminated the need for equidistant spacing of no more than 10 feet between strips of retroreflective sheeting.

Specifically, paragraph (a) of § 224.106 of this final rule provides that retroreflective sheeting must be located clear of appurtenances and devices such as ladders and other safety appliances or attachments that may obscure its visibility. Paragraph (a) also provides that retroreflective sheeting need not be applied over existing or required car stencils or markings, nor must the sheeting be applied to discontinuous surfaces such as bolts, rivets, door hinges, or other irregularly shaped areas that may prevent the sheeting from adhering to the car sides. To accommodate cars with limited unoccupied surface space suitable for attaching reflectors, paragraph (a) specifically provides that 4x18 inch and 4x36 inch strips of sheeting may be separated into either two 4x9 inch strips, or four 4x9 inch strips, and applied on either side of the interfering appurtenances, discontinuous surfaces, or car markings or stencils. In other words, for example, if there is not sufficient room to apply a 4x18 inch reflector on the side of a car without covering existing stenciling, a car owner may apply two 4x9 inch strips of sheeting, one on either side of the stenciling, as practicable.

Similar to paragraph (a) of proposed § 224.105, paragraph (a) of § 224.106 of this final rule sets forth the specific pattern of application for railroad freight cars generally (*e.g.*, box cars, gondola cars, and other similarly configured cars), tank cars, flat cars, and ''cars of special construction.'' As applied to freight cars, other than flat cars and tank cars, paragraph (a)(1) provides for either a vertical or horizontal pattern of retroreflective material along the length of the car sides, with the bottom edge of the sheeting as close as practicable to 42 inches from the top of the rail. Although FRA recognizes that the physical configuration of some freight cars will not allow for the placement of retroreflective sheeting at, or very near to, 42 inches from the top of the rail, in order to minimize the degradation of the material and maximize the material's effectiveness, paragraph (a)(1) provides that retroreflective sheeting shall not be applied below the side sill or above 72 inches from the top of the rail. Paragraphs (a)(1)(i) and (ii) also mandate that at least one 4x36 inch strip of retroreflective sheeting, or its equivalent (one square foot), be applied to car sides as close as practicable to each end of the car, and at least one 4x18 inch strip, or its equivalent (one-half a square foot), must be placed at least every 12 feet.

Paragraph (a)(2) addresses tank cars and remains substantially the same as originally proposed. Specifically, paragraph (a)(2) requires that on tank cars, retroreflective sheeting shall be applied vertically along the car sides and centered on the horizontal centerline of the tank, or as near as practicable. If it is not practicable to safely apply the sheeting centered on the horizontal centerline of the tank, the sheet may be applied vertically with its top edge no lower than the horizontal centerline of the tank. Similar to the pattern proposed in (a)(1), paragraph (a)(2) requires a minimum of one 4x36 inch (one square foot) strip of retroreflective material or two 4x18 inch strips, directly above each other, be applied vertically as close to each end of the tank as practicable, and at least one 4x18 inch strip (one-half a square foot) must be placed at least every 12 feet between the two end strips.

As explained in the NPRM, the intent of this configuration is that the retroreflective sheeting will be centered, as practicable, on the outermost curved area of the tank, thereby reflecting the most light. The placement pattern has been revised from that originally proposed for tank cars, however, in accordance with NAFCA's suggestion to avoid applying the sheeting in the ''drip path'' of the tank. Specifically, NAFCA explained that ''[i]t is inevitable that materials loaded into tank cars will experience some spillage onto the sides of the car during the loading process'' and that ''accumulated residue from spillage on the exterior of the cars may make it difficult for [retroreflective sheeting] to adhere'' and the sheeting would quickly become obscured by loading spillage. Accordingly, FRA has revised the required pattern of retroreflective sheeting to be applied to freight cars to specifically state that sheeting shall not be applied in the spillage area directly beneath the manway used to load and unload the tank.

Paragraph (a)(3) addresses flat cars (defined to include spine cars, articulated and multi-unit articulated cars) and provides for a horizontal pattern of retroreflective material along the length of flat cars' side sills, with the bottom edge of the sheeting no lower than the bottom of the side sill and the top edge of the sheeting no higher than the top of the car deck or floor. Similar to paragraphs (a)(1) and (2) of this section, paragraph (a)(3) requires that at least one square foot of retroreflective sheeting be applied as close to each end of the car, as practicable, and at least one-half a square foot of sheeting be applied at least every 12 feet between the two end strips. Recognizing the limited surface area of the sides of a typical flat car, paragraph (a)(3) provides that the one square foot of material at each car end may be applied in two 4x18 inch strips, one above the other, or if the side sill is less than eight inches wide, the two 4x18 inch strips may be applied one next to the other. Paragraph (a)(3) has been revised from that originally proposed for flat cars, in response to AAR's and TTX's comments specific to auto rack cars. In its comments, AAR explained that a typical auto rack car is nothing more than a conventional flatcar to which a separate rack has been attached. Further, TTX explained that although it owns almost 50,000 flat cars to which racks are attached, the company owns only a few of the actual racks; railroads own the majority of racks. Accordingly, TTX noted that if FRA wants the reflectors to be attached to the rack structure (which is higher than the flat car structure and closer to FRA's preferred height above top of rail of 42 inches), FRA ''would have to order the rack owner to be responsible.'' FRA recognizes TTX's concern in this regard, and the agency has accordingly revised paragraph (a)(3)

of this section to provide that if a car has a separate rack structure, retroreflective sheeting may be applied to the flat car portion only in accordance with the requirements of this section. FRA notes, however, that if a flat car and rack attachment are owned by the same freight rolling stock owner, to minimize the likely degradation of the retroreflective material on the car (and therefore the likely maintenance costs), it may be advisable to apply retroreflective material as close to 42 inches above the top of the rail as practicable.

Paragraph (a)(4), which is substantially unchanged from the proposed rule, addresses ''cars of special construction.'' Specifically, this paragraph requires that based on the length of a ''car of special construction,'' the car be equipped with the minimum amount of retroreflective sheeting as specified in § 224.105, applied in a pattern conforming as close as practicable to the standard patterns specified in paragraphs (a)(1) through (a)(3). Both AAR and TTX expressed concern that some rail cars, regardless of their physical shape, may not have sufficient unoccupied surface area to accommodate the minimum reflector area required under this rule. Accordingly, both AAR and TTX recommended that these ''cars of special construction'' that cannot accommodate the minimum square footage of sheeting required by the rule be equipped with at least three reflectors on each car side, each no less than 4x18 inches. FRA, however, does not believe that creating a blanket rule allowing certain freight cars to be equipped with three strips of retroreflective sheeting amounting to one and a half square feet of material is an effective way of increasing the conspicuity of freight cars. FRA notes, however, that if a freight car has insufficient unoccupied surface area to accommodate the minimum reflector area required under this rule, pursuant to § 224.7 of this final rule, the owner of the freight car may file for a waiver from the minimum requirements of § 224.105. The waiver process is discussed in more detail in the analysis of § 224.7 above.

Locomotives

As proposed in the NPRM, paragraph (b) of § 224.105 addressed the reflectorization pattern of locomotives. As explained in the NPRM, FRA recognizes that the conspicuity issues surrounding locomotives differ from the issues surrounding freight cars. For example, the physical configuration of locomotives is obviously quite different from the configuration of most freight cars; locomotives are often painted brighter colors than freight cars; locomotives owned by major railroads and used in road service are cleaned on a more frequent basis; and company logos are often displayed on the sides of locomotives in reflective materials. In addition, locomotives are equipped with light sources on the front and ''ditch'' lights on the sides. However, in modern railroad operations, locomotives are often embedded in train consists providing ''distributed power'' to the consists. In these instances, however, locomotives are typically operated without their front or side lights illuminated, and accordingly present the same conspicuity issues attendant to freight cars. Consequently, based on the rationale that some pattern of retroreflective material recognizable to motorists is necessary to facilitate motorists' recognition of locomotives in grade crossings, in paragraph (b) of proposed § 224.105, FRA proposed to allow any pattern of reflectorization on locomotives that divided the amount of retroreflective sheeting equally between both sides of a locomotive, provided a certain minimum amount of sheeting was applied to each locomotive side, and provided that the sheeting was applied in a ''pattern recognizable to motorists.'' Paragraph (b)(3) of proposed § 224.105 further provided that application of material horizontally along the sill or side walkway of a locomotive would be considered a ''pattern recognizable to motorists.''

In response to this proposal, AAR commented that the requirement that retroreflective material be applied to locomotives in a ''pattern recognizable to motorists'' was ''too vague to be meaningful.'' Further, citing the fact that railroads already typically reflectorize their locomotives with names and symbols, AAR noted that requiring retroreflective sheeting to be uniformly applied along locomotive sides ''would mean that reflective material would have to be used in addition to the names and symbols depicted on the locomotives, rather than as part of the names and symbols.'' Accordingly, AAR recommended that both of these proposed criteria be deleted and that FRA merely require that a minimum amount of retroreflective sheeting be equally distributed between the sides of locomotives.

Paragraph (b) of proposed § 224.103 reflected FRA's understanding that an effective pattern of locomotive reflectorization requires that the approximate length of the locomotive be defined by the reflective material. As detailed in the NPRM, research has consistently demonstrated that reflective material distribution patterns that either outline the shape of rail equipment, or that space the material over a large area of the equipment sides, are the most effective in increasing rail equipment visibility thereby enabling a motorist to distinguish a piece of rail equipment in his or her path from other potential obstacles. In addition, FRA notes that the reflectorized logos and symbols commonly found on locomotives are often applied so high on the locomotive sides that light from the headlights of approaching motor vehicles will, in most instances, not even reach the material; thus, the reflectorized logos and symbols will be ineffective in aiding approaching motorists to detect the presence of the locomotive. Accordingly, FRA continues to believe that for reflective material to effectively increase the visibility of locomotives to approaching motorists, it is necessary to spread the reflective material along the length of the locomotive sides, at a reasonable height. Thus, in this final rule, although FRA has removed the proposed language requiring the pattern of retroreflective material application on locomotive sides be a ''pattern recognizable to motorists,'' FRA has retained the general requirement that retroreflective material be spread along the length of locomotive sides, and FRA has further required that the material be applied as close as practicable to 42 inches above the top of the rail. FRA notes that most locomotives already reflectorized in the course of voluntary reflectorization programs are equipped with not only reflectorized logos and symbols, but also with reflective material applied along the length of the locomotive sides at platform height, exactly the pattern contemplated by this final rule.

Section 224.107 Implementation Schedule

As proposed in the NPRM, this section required that all freight cars subject to this part be equipped with retroreflective sheeting conforming to this part within ten years of the effective date of the final rule, and similarly, that all locomotives subject to this part be equipped within five years. Generally, FRA proposed that retroreflective sheeting be applied to new freight rolling stock at the time of construction and to existing stock when such stock was being repainted, rebuilt, or undergoing other periodic maintenance. As an alternative to this schedule, FRA proposed a more flexible approach of allowing freight car owners to designate, in individualized implementation plans, a schedule for the reflectorization of

their freight car fleets, provided they meet certain milestones designed to ensure that the entire fleet of domestically owned freight cars would be equipped with retroreflective sheeting within ten years.

Although the majority of commenters did not express disagreement with FRA's general proposal to implement a reflectorization requirement over a 10-year period, a few commenters expressed the view that the five-year implementation period proposed for the reflectorization of locomotives and the ten-year implementation period proposed for the reflectorization of freight cars was too long. One commenter, noting that the trucking industry implemented a reflectorization requirement in only two to three years, asserted that the proposed five- and ten-year implementation periods were ''unnecessarily long'' and that during the implementation period, because some rail cars will be equipped with reflectors while others will not be, ''[i]t is likely that some drivers will mistake unmarked cars in the crossing as a gap in the train.'' Although FRA understands the concerns of this commenter, FRA believes that, given the unique characteristics of the railroad industry, the five- and ten-year implementation periods are necessary to cost-effectively reflectorize the entire fleet of freight rolling stock subject to this rule. Accordingly, in this final rule, FRA has retained the general requirement that all freight cars subject to this rule be equipped with retroreflective sheeting within ten years, and that all locomotives subject to this part be equipped within five years.

Railroad Freight Cars

Newly constructed cars: Paragraph (a)(1) of proposed § 224.107 required that retroreflective sheeting be applied to newly manufactured rail cars at the time of the cars' construction. This proposed requirement was intended to ensure that newly manufactured rail cars are equipped with the proper retroreflective material before being placed in service. In this final rule, FRA has clarified this intent by specifying in paragraph (a)(1) of this section that retroreflective sheeting must be applied to newly manufactured cars before the cars are placed in service.

Existing cars without retroreflective sheeting: Paragraph (a)(2)(i) of proposed § 224.107 required that retroreflective sheeting be applied to existing unreflectorized freight cars when either (1) the car was being repainted or rebuilt, or (2) the car underwent its first single car air brake test (SCABT) (required under 49 CFR 232.305) after the effective date of the rule, whichever occurred first. FRA proposed this ''default'' schedule of retroreflective sheeting application in an attempt to achieve the most efficient and cost-effective implementation of the rule. FRA reasoned that by providing for the application of retroreflective sheeting when cars are out of service for regularly scheduled maintenance, the entire U.S. fleet of freight cars could be reflectorized well within the ten-year implementation period and would not be required to incur any additional downtime outside of the normal maintenance cycle for the purpose of reflectorization.

Paragraph (a)(2)(ii) of this section in the proposed rule provided that a freight car owner could elect not to follow the default schedule of paragraph (a)(2)(i), if the owner submitted a Fleet Reflectorization Implementation Plan (FRIP) to FRA within 60 days of the final rule's effective date. As proposed, the FRIP was required to (1) set forth the car numbers constituting the fleet subject to this part; (2) indicate when the identified cars were scheduled to be reflectorized; (3) contain an affirmation that at least 20% of the total fleet would be equipped with conforming retroreflective sheeting within 24 months after the effective date of the final rule; and (4) contain an affirmation that not less than an additional ten percent of the total fleet would be completed annually thereafter for the duration of the 10-year implementation period. Absent identification of a car in a FRIP, the proposed rule intended to require that conforming retroreflective sheeting be applied to that car at the time of its first SCABT after the effective date of the final rule.

Although a few commenters addressed FRA's proposal to require the application of reflectors when a freight car is being repainted or rebuilt, most commenters expressed the view that the initial installation of reflectors should not be required at the time of the SCABT. These commenters noted that at least one retroreflective material manufacturer recommends against the application of retroreflective material to rail cars under conditions of extreme temperature. Specifically, 3M's ''Application Instructions for 3M Diamond Grade Conspicuity Markings on Rail Cars'' notes that retroreflective material should not be applied when air and application surface temperatures are below 45 °F or above 100 °F. Accordingly, several commenters noted that this temperature restriction would be a major obstacle in applying the retroreflective material at the time of the SCABT in the many locations throughout the United States at which the SCABT is routinely performed at outdoor or unheated locations in temperatures above or below these minimum and maximum recommended temperatures. For example, the AAR notes that in Bangor, Maine; Minneapolis, Minnesota; and North Platte, Nebraska, the average low temperature is below 50 °F for eight or more months of the year, while in these same cities the average high temperature is below 50 °F for at least four months. Similarly, CP noted that almost 3,000 (43%) of all SCABTs performed in 2003 in the company's St. Paul service area were performed when monthly average temperatures, both high and low, were below 50 °F. Accordingly, CP concluded that given the temperature constraints, ''it would often be impossible to apply [retroreflective] material at a repair track'' and instead, cars would have to be sent to a repair facility. At the January hearing, Mr. James Hart, a representative of ARC, testified that ARC's member companies have had several years of experience in applying reflective material to new rail cars (presumably because of the various voluntary reflectorization programs already underway in the rail industry). Based on these years of experience, Mr. Hart indicated that Institute members have determined that reflective material adheres best when applied in temperatures of at least 60 °F, and even better, when applied at temperatures over 70 °F.

At the January hearing, NAFCA also expressed the view that the single car air brake test is not the appropriate time for the initial application of retroreflective material to freight cars. Specifically, NAFCA commented that ''the body surface condition, temperature, and preparation environment on railroad repair or RIP tracks is not optimal, potentially resulting in reduced life of the reflective material,'' and therefore leading to increased costs for the car owner. Mr. Hart, of ARC, echoed NAFCA's concerns by explaining that the cleanliness of the surface to which one applies retroreflective material is critical. Mr. Hart explained that various surfaces (*e.g.*, aluminum cars versus steel cars, etc.) have different preparation requirements. For example, Mr. Hart explained that in applying reflective materials to freight cars with aluminum surfaces, the outside surface must be etched with acid to remove the outer coating enabling the material to adhere to the car sides. Mr. Hart further explained that ''application techniques and skills must be acquired'' and that if

the material is not applied properly, it will not appropriately adhere to the surface. In its comments, AAR also noted that because FRA's proposed rule provided for approval of alternative standards, it would be ''impossible'' for SCABT facilities to be equipped to install retroreflective material pursuant to the variety of reflectorization programs that could be in place.

As an alternative to requiring that retroreflective material be installed at the time of the SCABT, several commenters, including AAR, CP, and CN, recommended a more flexible schedule whereby all owners of freight cars would be required to install the retroreflective material on their freight car fleets in accordance with the schedule FRA proposed for FRIPs. These commenters further suggested that all freight car owners be required to report annually to FRA the status of their compliance with the FRIP schedule, not report in advance which cars were planned to be reflectorized in each particular year as the proposed rule would require. Specifically, AAR asserted that allowing all car owners to reflectorize their freight car fleets in accordance with the proposed FRIP schedule and report compliance annually would yield several advantages over the system proposed in the NPRM. For example, AAR asserted that such a program would enable car owners to (1) take weather conditions into account in scheduling cars for reflectorization; (2) account for the planned retirement of freight cars and scheduled repainting; and (3) have sufficient flexibility to change which cars would be reflectorized in a given year.

Although FRA continues to believe that the schedule set forth in § 224.107(a)(2)(i) of the proposed rule is the most efficient and cost-effective method of implementing a nationwide reflectorization program, FRA recognizes the practical issues commenters raised regarding application of retroreflective material to rail cars at the time of the SCABT. FRA, however, does not believe that requiring all freight car owners to develop and implement individualized reflectorization plans would be an efficient method of implementing a nationwide reflectorization program. Accordingly, FRA has revised the proposed ''default'' schedule of § 224.107(a)(2)(i) to allow car owners and railroads a certain amount of flexibility as to when to apply retroreflective material to existing non-reflectorized freight cars. Specifically, this final rule requires that retroreflective sheeting be applied to existing non-reflectorized freight cars when, after May 31, 2005, the cars are (1) repainted or rebuilt, or (2) within nine months after the car first undergoes a SCABT as prescribed by 49 CFR 232.305, whichever occurs first. FRA believes that most every freight car will be taken out of service at some time at least once every nine months for either regularly scheduled maintenance or other necessary repairs. Allowing nine months after the SCABT to apply retroreflective material allows car owners and railroads to apply retroreflective material while a car is out of service for these other reasons (and while the car is at an appropriate repair facility), thereby eliminating the need to take a car out of service for the particular purpose of applying retroreflective material.

In paragraph (a)(2)(ii) of § 224.107 of this final rule FRA has retained the proposed rule's more flexible option of allowing freight car owners to effectively ''opt-out'' of the default schedule of § 224.107(a)(2)(i) and develop and implement their own schedule for reflectorization, provided certain milestones are met. In response to the concerns expressed by several commenters regarding the proposed information to be required in FRIPs, however, FRA has streamlined the reporting requirements for car owners who elect to follow this alternative and provided additional time from that proposed for car owners to develop and submit to FRA their individualized reflectorization plans. Specifically, in this final rule paragraph (a)(2)(ii) of § 224.107 provides that a freight car owner may elect not to follow paragraph (a)(2)(i)'s schedule if, by July 1, 2005, the owner submits to FRA an initial Reflectorization Implementation Compliance Report (Compliance Report). The Compliance Report must, at a minimum, (1) indicate how many freight cars subject to the final rule are in the owner's fleet at the time the Compliance Report is being prepared, and (2) contain the owner's certification that all freight cars in the identified fleet will be equipped with the appropriate retroreflective sheeting in conformance with the schedule set forth in Table 3 of the rule. Although FRA intends the schedule in Table 3 of this final rule to be consistent with that of the proposed rule, FRA has revised the language slightly to clarify FRA's intent. As proposed, § 224.107(a)(2)(ii) required that after the initial two years of the implementation period, at least an additional 10% of each owner's freight car fleet be reflectorized each year, until upon expiration of the 10-year implementation period, 100% of all domestically-owned freight cars would be equipped with retroreflective sheeting. In other words, as proposed, even if a car owner had reflectorized 70% of its car fleet by the end of year three, by the end of year four, the car owner would need to reflectorize at least another 10% of its fleet, and by the end of year five, the car owner would need to reflectorize at least another 10% of its fleet. In this scenario, because the car owner reflectorized ahead of schedule in the first three years, to comply with the proposed schedule, the owner would have to complete the reflectorization of its entire freight car fleet by the end of year six. This was not FRA's intent. Accordingly, FRA has revised the schedule for application for retroreflective material pursuant to this alternative schedule by setting forth a more general requirement that car owners meet certain minimum percentage milestones each year throughout the 10-year implementation period. For example, § 224.107(a)(2)(ii) of this final rule requires that as of May 31, 2007 (approximately two years after the effective date of this rule), owners reflectorizing their freight car fleets pursuant to this alternative schedule must have reflectorized at least 20% of their total fleet; by May 31, 2008 (approximately three years after the effective date of this rule), owners must have reflectorized at least 30% of their total fleet; by May 31, 2009 (approximately four years after the effective date of this rule), owners must have reflectorized at least 40% of their total fleet, until at the end of the 10-year implementation period (*i.e.*, May 31, 2015), 100% of the entire domestically owned freight car fleet is equipped with retroreflective material in accordance with the rule.

If a freight car owner elects the procedures of paragraph (a)(2)(ii) and submits a Compliance Report to FRA, the owner is thereafter responsible for meeting the percentage requirements of paragraph (a)(2)(ii) (Table 3) and the owner is responsible for submitting an updated Compliance Report to FRA by July 1st of each year throughout the 10-year implementation period. In keeping with the requirements of the Paperwork Reduction Act and the Government Paperwork Elimination Act, FRA anticipates providing car owners with the option of submitting Compliance Reports to FRA electronically.

If an owner fails to meet any of the minimum milestones set forth in Table 3 of this final rule, the car owner must report the failure in writing to FRA's Associate Administrator for Safety. Thereafter, the owner will be required to

comply with the schedule set forth in paragraph (a)(2)(i) and the owner must take any additional action necessary to bring cars under his or her ownership or control into compliance. In other words, if an owner fails to meet the minimum milestones set forth in Table 3 of this final rule, once this failure is identified, the owner will be required to equip each of the freight cars in the fleet subject to this rule with retroreflective sheeting within nine months of the cars' next SCABT (as required by § 224.107(a)(2)(i)) occurring after the end of the reporting period in which the failure occurred. The car owner, however, remains responsible for ensuring that each freight car in his or her fleet subject to this rule is equipped with retroreflective sheeting conforming to this rule by the end of the 10-year implementation period (*i.e.*, by May 31, 2015).

Existing cars already equipped with retroreflective sheeting as of publication date of final rule: Recognizing the voluntary efforts already underway by many railroads and car owners to reflectorize their freight car fleets, paragraph (a)(3) of proposed § 224.107 provided that freight cars equipped with at least one square foot of retroreflective material, uniformly distributed over the length of each car side, will be considered in compliance with this rule for ten years from the effective date of the final rule, provided that the sheeting was not engineering grade, super engineering grade (enclosed lens), or glass bead encapsulated type sheeting. As explained in the NPRM, FRA proposed a minimum requirement of one square foot of retroreflective sheeting per car side under this section because based on the information provided to FRA to date, it appears that one square foot per side is the minimum amount currently utilized in existing voluntary reflectorization programs. If these car owners were required to replace the retroreflective materials that they voluntarily installed to improve safety, it would have the effect of penalizing owners that demonstrated an extra level of safety consciousness. This would have the unintended effect of discouraging car owners from exploring innovative approaches to improving safety. As also explained in the NPRM, FRA proposed to exclude all engineering grade and glass bead encapsulated type retroreflective sheeting because such sheeting does not meet the minimum photometric performance requirements of § 224.103. Accordingly, as proposed, freight cars already equipped with engineering grade, super engineering grade, or glass bead encapsulated type retroreflective sheeting, or any other reflective material that is not retroreflective, would have to be brought into compliance with this part in accordance with § 224.107(a)(2). Because FRA received no comments directly related to this proposed freight car grandfathering provision, FRA has retained this provision substantially as proposed. The term ''unqualified retroreflective sheeting'' is discussed in more detail in the analysis of §§ 224.5 and 224.107 of this final rule.

Locomotives

Newly constructed locomotives: Paragraph (b)(1) of proposed § 224.107 required that retroreflective sheeting be applied to newly manufactured locomotives at the time of the locomotives' construction. This proposed requirement was intended to ensure that newly manufactured locomotives are equipped with the proper retroreflective material before being placed in service. In this final rule, we have clarified this intent by specifying in paragraph (b)(1) of this section that retroreflective sheeting must be applied to newly manufactured locomotives before the locomotives are placed in service.

Existing locomotives without retroreflective sheeting: Paragraph (b)(2) proposed to require that retroreflective sheeting be applied to existing unreflectorized locomotives (*i.e.*, locomotives that, as of the date of publication of the final rule, are not equipped with at least one square foot of retroreflective sheeting on each side) no later than the first biennial inspection performed pursuant to 49 CFR 229.29 occurring after the effective date of the final rule. Similar to the schedule FRA proposed for the application of retroreflective material to freight cars, FRA proposed this ''default'' schedule for locomotives in an attempt to achieve the most efficient and cost-effective implementation of a nationwide reflectorization program. FRA reasoned that by providing for the application of retroreflective sheeting when a locomotive is already out of service for the required biennial inspection, the entire U.S. locomotive fleet could be reflectorized well within the five-year implementation period and that locomotives would not incur any additional out of service time for the purpose of reflectorization.

In response to the proposed schedule for the reflectorization of locomotives, AAR noted that FRA's proposal to require existing non-reflectorized locomotives to be equipped with retroreflective material at the first biennial inspection after the effective date of the final rule, would effectively require that the entire locomotive fleet be equipped within two years. AAR, citing the fact that FRA's stated safety justification for requiring reflectorization rests on the number of grade crossing accidents involving motor vehicles striking trains after the first two units of train consists (*i.e.*, motor vehicles striking freight cars, not locomotives), asserted that ''[t]here is no safety justification for requiring locomotives to be reflectorized within two years when freight car owners are given ten years.'' Accordingly, AAR recommended that FRA require 40 percent of an owner's locomotive fleet be equipped with retroreflective sheeting within the first two years following the effective date of the final rule and 20 percent annually for the following three years.

As indicated by FRA's discussion of proposed § 224.107 in the NPRM (68 FR 62960), FRA's intent in the proposed rule was to ensure that the entire fleet of domestically-owned locomotives subject to this rule would be equipped with conforming retroreflective sheeting within five years of the effective date of the final rule. For practical reasons, however, FRA proposed to require that retroreflective sheeting be applied to locomotives at the time of the biennial inspection (*e.g.*, locomotives are already out of service for the inspection and located at an appropriate facility where application of retroreflective sheeting is feasible). FRA, however, is not opposed to allowing locomotive owners flexibility in deciding when to apply retroreflective material to existing non-reflectorized locomotives, provided owners inform FRA of their plan and agree to meet certain milestones designed to ensure that the entire domestically-owned locomotive fleet will be equipped with retroreflective material within five years. Accordingly, although this final rule retains the ''default'' schedule of proposed § 224.107(b)(2) (requiring that retroreflective sheeting be applied to existing non-reflectorized locomotives at the time of the first biennial inspection after the effective date of the rule), paragraph (b)(2)(ii) of § 224.107 in this final rule has been revised in a similar manner to paragraph (a)(2)(ii)'s freight car provision. Specifically, paragraph (b)(2)(ii) provides that locomotive owners may effectively ''opt-out'' of the default schedule of paragraph (b)(2)(i) and develop and implement their own schedule for reflectorization of their locomotive fleet, provided certain milestones are met. Paragraph (b)(2)(ii) now provides that a

locomotive owner may elect not to follow paragraph (b)(2)(i)'s schedule, if by July 1, 2005, the owner submits to FRA a Compliance Report that, at a minimum, (1) indicates how many locomotives subject to the final rule are in the owner's fleet at the time the Compliance Report is being prepared, and (2) contains the owner's certification that all locomotives in the identified fleet will be equipped with retroreflective sheeting in conformance with the schedule set forth in Table 4 of the rule. Table 4 requires that as of May 31, 2007 (approximately two years after the effective date of this rule), locomotive owners choosing to apply retroreflective material pursuant to this alternative schedule must have reflectorized at least 40% of their total locomotive fleet; by May 31, 2008 (approximately three years after the effective date of this rule), owners must have reflectorized 60% of their total locomotive fleet; by May 31, 2009 (approximately four years after the effective date of this rule), locomotive owners must have reflectorized 80% of their total locomotive fleet, until at the end of the five-year implementation period (*i.e.*, by May 31, 2010), 100% of the entire domestically-owned locomotive fleet is equipped with retroreflective material in accordance with the rule.

If a locomotive owner elects the procedures of paragraph (b)(2)(ii) and submits a Compliance Report to FRA, the owner is thereafter responsible for compliance with the plan and the owner is responsible for submitting an updated Compliance Report to FRA by July 1st of each year thereafter for the duration of the five-year implementation period. In keeping with the requirements of the Paperwork Reduction Act and the Government Paperwork Elimination Act, FRA anticipates providing locomotive owners with the option of submitting Compliance Reports to FRA electronically.

If a locomotive owner fails to meet any of the minimum milestones set forth in Table 4 of this final rule, the locomotive owner must report the failure in writing to FRA's Associate Administrator for Safety. Thereafter, the owner will be required to comply with the schedule set forth in paragraph (b)(2)(i) and the owner must take any additional action necessary to bring locomotives under his or her ownership or control into compliance. In other words, if an owner fails to meet any of the minimum milestones set forth in Table 4 of this final rule, once this failure is identified, the owner will be required to equip each of the locomotives in the fleet subject to this rule with retroreflective sheeting at the locomotive's next biennial inspection performed pursuant to 49 CFR 229.29 occurring after the end of the reporting period in which the failure occurred. The locomotive owner, however, remains responsible for ensuring that each freight car in his or her fleet subject to this rule is equipped with retroreflective sheeting conforming to this rule by the end of the five-year implementation period (*i.e.*, by May 31, 2010).

Existing locomotives already equipped with retroreflective sheeting as of the publication date of the final rule: Again, recognizing the voluntary efforts already underway by many locomotive owners to reflectorize their locomotive fleets, paragraph (b)(3) of proposed § 224.107 provided that locomotives equipped with at least one square foot of retroreflective sheeting, uniformly distributed over the length of each locomotive side, would be considered in compliance with this rule for five years from the effective date of the final rule, provided that the sheeting was not engineering grade, super engineering grade (enclosed lens), or glass bead encapsulated type sheeting. As explained in the NPRM, FRA proposed a minimum requirement of one square foot of retroreflective sheeting per locomotive side because based on the information provided to FRA to date, it appears that one square foot per side is the minimum amount currently utilized in existing voluntary reflectorization programs. If these locomotive owners were required to replace the retroreflective materials that they voluntarily installed to improve safety, it would have the effect of penalizing owners that demonstrated an extra level of safety consciousness and discouraging these owners from exploring innovative approaches to improving safety in the future. As also explained in the NPRM, FRA proposed to exclude all engineering grade and glass bead encapsulated type retroreflective sheeting because such sheeting does not meet the minimum photometric performance requirements of § 224.103. Accordingly, as proposed, locomotives already equipped with engineering grade, super engineering grade, or glass bead encapsulated type retroreflective sheeting, or any other reflective material that is not retroreflective, would have to be brought into compliance with this part in accordance with § 224.107(a)(2).

A few commenters, including AAR and CN, expressed the view that FRA's proposed locomotive grandfathering provision was too limited because it only encompassed ''diamond-grade'' material.[11] Specifically, CN noted that its fleet of locomotives in service in the United States, both new and recently repainted, is equipped with yellow stripes of ''high-intensity grade'' retroreflective material, approximately six inches wide, along the entire length of the locomotive side sills. Further, CN noted that on a typical seventy foot locomotive, this equates to approximately 32–35 square feet of retroreflective material per side. CN questioned FRA's rationale for excluding locomotives equipped with over 30 times the amount of required material from the grandfathering provision merely because the material is a different grade than that contemplated by FRA's proposal. Accordingly, CN recommended that the proposed rule's grandfathering provision for locomotives be revised to include locomotives with ''large areas of reflective material of lower grade spread along the entire length'' of the locomotive.

As explained above, FRA proposed to exclude all engineering grade and glass bead encapsulated type retroreflective sheeting from the grandfathering provision because the sheeting does not meet the minimum photometric performance requirements of the proposed rule. As detailed in the NPRM, however, FRA notes that research has consistently demonstrated that the larger the reflector area, the smaller the required SIA of the reflector. In other words, a larger amount of less-reflective material (material with a lower SIA) can be just as effective as a smaller amount of more-reflective material (material with a higher SIA). Based on the photometric performance requirements of engineering grade and glass bead encapsulated type retroreflective sheeting set forth in ASTM standard D 4956–01a, FRA estimates that approximately three square feet of these types of sheeting are necessary to achieve the effectiveness of one square foot of sheeting conforming to the minimum photometric performance requirements of this final rule.

[11] FRA notes that the term ''diamond-grade'' is a brand name referring to particular retroreflective products manufactured by 3M. FRA understands that ''diamond-grade'' is not a generic term referring to specific ASTM sheeting ''Types,'' nor is ''diamond-grade'' an accurate shorthand for the group of three categories of retroreflective sheeting that FRA specifically proposed to exclude from the locomotive grandfathering provision of § 224.107(b)(2) (*i.e.,* engineering grade, super engineering grade, or glass bead encapsulated sheeting). Nonetheless, FRA interprets AAR's and DN's comments as asserting that FRA's proposal to specifically exclude engineering grade, super engineering grade, and glass bead encapsulated sheeting from the locomotive grandfathering provision as too narrow.

Accordingly, paragraph (b)(3) of § 224.107 of this final rule has been revised to provide that locomotives equipped with at least three square feet of ''unqualified retroreflective sheeting'' will be considered in compliance with this rule through May 31, 2015 (approximately ten years from the effective date of the final rule).[12] As discussed in the analysis of § 224.5 above, the term ''unqualified retroreflective sheeting'' has been defined to include all engineering grade and glass bead encapsulated type retroreflective material (*i.e.*, the material FRA previously excluded from the FRA's proposed locomotive grandfathering provision), as well as ''high-intensity'' type sheeting as described in ASTM standard D 4956–01a (*i.e.*, ASTM Type I, II, III, or IV).[13]

Although this final rule requires that most railroads equip all their locomotives subject to this rule with conforming retroreflective sheeting within five years of the effective date of the rule, paragraph (b)(4) of § 224.107, which has not changed from that proposed in the NPRM, provides that certain small railroads may take an additional five years to bring their locomotive fleets into compliance with the rule. Specifically, paragraph (b)(4) provides that railroads with fewer than 400,000 annual employee work hours that do not share locomotive power with a railroad with 400,000 or more annual employee work hours may take up to ten years to bring their locomotive fleets into compliance with the rule. This alternate compliance date is intended to apply only to a limited number of small railroads whose operations would justify the continued use of unreflectorized locomotives (*i.e.*, those small railroad operations that do not typically involve locomotives providing ''distributed power'' or otherwise moving unilluminated in the middle of train consists).

[12] FRA notes that it has revised the grandfather provision of § 224.107(b)(3) to provide that locomotives grandfathered under the final rule will be considerred in compliance with the rule for ten years, consistent with the grandfather provision of § 224.107(a)(3) for freight cars.

[13] FRA notes that the proposed rule did not specifically exclude ''high-intensity'' type retroreflective sheeting (ASTM Type IV sheeting), but because high-intensity type sheeting, like all engineering grade sheeting and glass bead encapsulated type sheeting, will not meet the minimum photometric performance standards of this rule, it is necessary for locomotives to be equipped with more than one square foot of ''high-intensity'' material in order to achieve the effectiveness of one square foot of sheeting conforming to the minimum photometric performance requirements of this rule.

Section 224.109 Inspection, Repair, and Replacement

As it did in the NPRM, this section of the final rule sets forth the requirements for the periodic inspection and maintenance of retroreflective material on freight rolling stock. Paragraph (a) of proposed § 224.109 required that retroreflective sheeting on freight cars subject to this part be visually inspected for presence and condition whenever a car underwent a single car air brake test required under 49 CFR 232.305. Likewise, paragraph (b) of proposed § 224.109 required that retroreflective sheeting on locomotives subject to this part be visually inspected for presence and condition whenever the locomotive underwent an annual inspection required under 49 CFR 229.27. Both paragraphs (a) and (b) proposed that, if, upon inspection, more than 20 percent of the amount of sheeting required on either side of the car or locomotive under § 224.105 is found to be ''damaged, obscured, or missing,'' that ''damaged, obscured, or missing'' sheeting must be replaced.

A few commenters, including AAR, NAFCA, and RSI, noted that the term ''damaged'' was not defined in the proposed rule. These commenters indicated that FRA's intent in including the undefined term ''damaged'' as a maintenance standard in § 224.109 was unclear and that the term itself only added confusion to the inspection requirement. Accordingly, these commenters recommended that the term ''damaged'' be deleted from the rule. FRA recognizes the concerns of these commenters regarding the undefined term. Nonetheless, FRA believes that the term ''damaged'' is necessary to accurately describe a situation in which maintenance of retroreflective material would be required. Accordingly, as discussed in the analysis of § 224.5 above, FRA has included a definition for the term ''damaged'' in this final rule.

Commenters also noted that there may be circumstances in which retroreflective material is damaged or obscured, but the material can be repaired instead of replaced. FRA agrees with commenters on this point, and the agency has accordingly revised § 224.109 to allow for the repair or replacement, as appropriate, of material requiring maintenance.

Several commenters also expressed the view that although it is appropriate to require that retroreflective material be inspected at the SCABT, for the same reasons that it is not appropriate to require the installation of retroreflective material at the SCABT (detailed in the discussion of § 224.107 above), it is also not appropriate to require that maintenance be performed on the retroreflective material at the SCABT. Accordingly, AAR recommended that car owners be afforded nine months after the SCABT in which to perform any necessary maintenance on retroreflective material. NAFCA, on the other hand, asserted that car owners should be allowed at least 12 months after the SCABT to correct any identified deficiencies in retroreflective material. In support of its recommendation, NAFCA noted that private car operators (shippers) typically obligate themselves to acquire and ship commodities as much as a year in advance. NAFCA also noted that unlike the typical railroads, private car operators seldom size excess capacity into their fleets. Notwithstanding NAFCA's comments, as explained in the discussion of § 224.107 above, FRA believes that almost every freight car will be taken out of service at least once every nine months for either regularly scheduled maintenance or other necessary repairs. Allowing nine months after the SCABT to repair or replace any retroreflective material requiring maintenance under this rule allows car owners and railroads to apply the material while a car is out of service for these other reasons (and while the car is at an appropriate repair facility), therefore eliminating the need to take a car out of service for the particular purpose of repairing or replacing retroreflective material in need of maintenance. Accordingly, § 224.109 of this final rule retains the proposed rule's requirement that retroreflective sheeting on freight cars be visually inspected for presence and condition whenever a car undergoes a SCABT. FRA has revised this section to require the railroad or contractor performing the SCABT to inspect the car for presence and condition of the required retroreflective material. If the inspecting railroad or contractor determines that maintenance is necessary under this rule, the railroad or contractor is required to promptly notify the car owner of the missing, damaged, or obscured sheeting, and car owners are afforded nine months from the date they are notified of the defective condition of the material to properly repair or replace the material.

A few commenters also asserted that the 20% maintenance threshold of proposed § 224.109 was impractical and arbitrary. These commenters suggested that a 50% maintenance threshold would be more appropriate. For example, RSI commented that the 20 percent standard ''is too hard to judge

in a railroad environment'' and NAFCA commented that the 20 percent maintenance threshold ''may result in a greater degree of car reflectorization than is necessary to accomplish the purpose'' of the rule. Further, AAR, in its comments, noted that at the January 2004 hearing, a representative of FRA stated that in order to account for the effects of dirt and damage, the proposed rule required twice the amount of material than research demonstrated was necessary to provide adequate reflectorization. (*See* Hearing Transcript, p. 124). FRA realizes, however, that the hearing officer inadvertently misstated the exact technical requirements of the rule in this regard. As noted in the discussion of § 224.106 above and detailed in the NPRM (68 FR at 62956), FRA's proposed rule required only approximately 30% more material (about 1 additional square foot on each side of most typically-sized freight rolling stock). By requiring 30% more retroreflective material than necessary, if less than 20% of that material is damaged, obscured, or missing, the remaining reflective material could still provide sufficient reflectivity, even if further damage occurred before maintenance was performed on the material. If maintenance was not performed until 50% of the retroreflective material is damaged, obscured, or missing, it would be necessary to repair or replace the material immediately or else the reflective material would fail to meet even the minimum performance requirements of this rule. Accordingly, this final rule retains the proposed 20% maintenance threshold.

Section 224.111 Renewal

As proposed in the NPRM, this section of the final rule requires that all retroreflective sheeting required under this part be replaced with new conforming sheeting, regardless of its condition, no later than ten years after the date of initial installation. As explained in the NPRM, this 10-year renewal period is based on most manufacturers' stated useful life of retroreflective material. As noted in the NPRM, however, FRA will monitor the retroreflective qualities of various fleet segments over time and may extend the ten-year interval, if warranted. One commenter, RSI, responded to the proposed renewal period by expressing the view that given the typical 50-year life of a freight car, it is not practical to require the replacement of the tape every ten years. Specifically, RSI asserted that ''[t]he cost of removing the old tape, preparing the surface, and replacing the tape was not included in FRA's cost analysis. * * * Different cars may require different technologies to remove the tape adding to the costs associated with the NPRM.'' As proposed and as noted in § 224.107 of this final rule, it is not necessary to remove old reflective material when applying new retroreflective material pursuant to this part, thus the costs for the re-application of material after the initial ten-year implementation of this rule will be no greater than the original application.

AAR, however, noted one ambiguity in § 224.111 as proposed. Specifically, AAR noted that proposed § 224.107(a)(3) provided that a car with complying retroreflective sheeting would be considered in compliance with this rule for ten years and similarly, proposed § 224.107(b)(3) provided that locomotives already equipped with reflectorization material meeting FRA's grandfathering requirements would be considered in compliance with this rule for five years. AAR noted, however, that because proposed § 224.111 provided that retroreflective sheeting must be replaced ten years after the date of initial installation, the section could be read as taking precedence over proposed §§ 224.107(a)(3) and (b)(3), thereby requiring the application of retroreflective material to freight rolling stock already equipped with reflective sheeting as of the effective date of the final rule prior to the expiration of a ten-year period. FRA agrees with AAR's concern in this regard and because FRA does not intend that § 224.111 take precedence over §§ 224.107(a)(3) and (b)(3), FRA has revised § 224.111 to make clear that the effective date of the final rule will be considered the initial date of installation for freight cars and locomotives covered by §§ 224.107(a)(3) and (b)(3).

Regulatory Impact and Notices

A. Executive Order 12866 and DOT Regulatory Policies and Procedures

The FRA has conducted a Regulatory Analysis of this final rule in accordance with Executive Order 12866. This document estimates the costs and consequences of the rule as well as its anticipated economic and safety benefits. A copy of this document has been placed in the docket for this rulemaking. Following is a summary of the findings.

The FRA's analysis examines the potential for reflective material to cost-effectively reduce fatalities and injuries due to motorists not seeing trains. Over the past ten years, an average of 23 percent of reported grade crossing accidents involved a motor vehicle striking the side of a train that was occupying the crossing (known as ''run-into-train'' or RIT accidents).

There are currently no requirements for lighting or for reflective markings on the sides of freight cars. Research, however, has established that reflectors on the sides of rail cars can make trains more visible to motorists. Reflective tape increases the conspicuity of freight cars so motorists can identify them and better judge their speed and distance. This greater visibility will help drivers avoid some accidents and reduce the severity of other accidents that are unavoidable.

The primary source of societal benefits from freight car reflectorization would result from the avoidance of a portion of the fatalities, injuries, and property damage that result from RIT accidents. Benefits were calculated in terms of the decline in the probability of certain accidents. These calculations were based on 1999–2002 RIT accidents as reported in the FRA's Rail Accident/Incident Reporting System (''RAIRS'') database. The FRA specifically used recent data to account for changes in crossing characteristics, including the upgrading of crossing warning devices. The following table shows the number of accidents, fatalities, and injuries resulting from the applicable RIT accidents:

REFLECTORIZATION BENEFIT POOL

[RIT accident subset]

	1999–2002	Annual Average
Accidents	782	195.5
Fatalities:	85	21.25
Injuries	348	87

The table below presents the estimated twenty-year monetary costs associated with complying with the requirements contained in this final rule, at a discount rate of 7%. In addition to the costs associated with reflectorizing the fleet of freight railcars, the FRA has included the costs associated with reflectorizing the approximately 20% of the locomotive fleet that has not already been treated with reflective materials.

TOTAL TWENTY-YEAR COSTS (NPV, 7%)

Installation on new or re-painted railcars	$52,862,702
Maintenance on preexisting reflectorized railcars	1,995,895
Maintenance on newly reflectorized cars	3,539,885
Reapplication on older cars ..	14,762,187

TOTAL TWENTY-YEAR COSTS (NPV, 7%)—Continued

Installation and maintenance on locomotive fleet	1,375,161
Total Costs	74,535,830

Taking into consideration the material, installation, and maintenance costs, FRA's analysis determines that over a 20-year period, the discounted cost to reflectorize the entire freight railroad fleet would be about $74.5 million.

The FRA recognizes that the effectiveness of retroreflectors and, therefore, the benefits to be gained from their use, will vary by circumstances (*e.g.* nighttime versus daytime conditions, clear versus cloudy weather, presence of other warning devices at the crossings, train speed and length, etc.). Thus, the forecasting of the benefits that would likely result from reflectorization requires the exercise of judgment and necessarily includes subjective elements. Accordingly, the FRA employed three completely separate approaches to the estimation of benefits. Benefit estimates were based on varying effectiveness rates derived from (1) Subjective estimates of reflector effectiveness by internal FRA grade crossing experts, (2) a signal detection model consisting of an analysis of the statistical probability of different potential severities of hazard or injury and based on both laboratory experiments and data from FRA's RAIRS database, and (3) previous studies analyzing the effectiveness of reflective materials on large trucks. The FRA estimates the twenty-year discounted benefits of a railcar reflectorization program (discounted at a rate of 7%), in terms of avoided casualties and property damage, to be in the range of $202 million, $151 million, or $220 million, depending on the method employed. In addition, the twenty-year discounted benefits of reflectorizing the 20% of the locomotive fleet that is not already reflectorized is approximately $837,749.53.

TOTAL TWENTY-YEAR SAFETY BENEFITS MONETIZED (NPV, 7%)

Grade Crossing Expert Benefits	$202,072,296
Signal Detection Theory	151,422,826
NHTSA Study.	223,137,643

Accordingly, the FRA concludes that the reflectorization of railroad freight equipment is a cost-effective way to reduce the number of accidents at highway-rail grade crossings as well as the resultant casualties and property damages.

B. Regulatory Flexibility Act of 1980 and Executive Order 13272

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601–612) requires a review of final rules to assess their impact on small entities unless the Secretary certifies that a final rule will not have a significant economic impact on a substantial number of small entities. FRA has conducted a regulatory flexibility analysis of this final rule's impact on small entities, and the assessment has been placed in the public docket for this proceeding. FRA's analysis concluded that this final rule would not have a significant economic impact on a substantial number of small entities, and accordingly, FRA certifies that this rule will not have a significant economic impact on a substantial number of small entities.

C. Paperwork Reduction Act of 1995

The information collection requirements in this final rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq*. The sections that contain the new information collection requirements and the estimated time to fulfill each requirement are as follows:

CFR section	Respondent universe	Total annual responses	Average time per response	Total annual burden hours	Total annual burden cost ($)
224.7—Waivers	685 Railroads/Car Owners	10 petitions	1 hour	20	740
224.15—Special Approval Procedures—Petitions.	3 Manufacturers	10 petitions	40 hours	400	20,560
—Public Comment	3 Manufacturers/Railroads	5 comments	1 hour	5	185
224.107—Implementation Schedule: Freight Cars.					
—Existing Freight Cars w/o Retroreflective Sheeting.	685 Railroads/Car Owners	400 Reports/Forms	15 minutes	100	3,700
—Updated Reflectorization Compliance Reports.	685 Railroads/Car Owners	400 Reports/Forms	20 hours	8,000	296,000
—Failure Reports	685 Railroads/Car Owners	5 Failure Reports	2 hours	10	370
—Existing Cars with Retroreflective Sheeting.	685 Railroads/Car Owners	172 Reports/Forms	20 hours	3,440	127,280
Implementation Schedule: Locomotives					
—Existing Locomotives w/o Retroreflective Sheeting.	685 Railroads/Car Owners	35 Reports/Forms	15 minutes	9	333
—Updated Reflectorization Compliance Reports.	685 Railroads/Car Owners	35 Reports/Forms	3 hours	105	3,885
—Failure Reports	685 Railroads/Car Owners	1 Failure Report	2 hours	2	74
—Existing Locomotives with Retroreflective Sheeting.	685 Railroads/Car Owners	617 Reports/Forms	4 hours	2,468	91,316
224.109—Inspection, Repair, Replacement—Freight Cars.	AAR + 300 Car Shops	240,000 Notifications	10 minutes	40,000	1,560,000
—Locomotives: Records of Restriction.	22,800 Locomotives	4,560 records	3 minutes	228	10,488

All estimates include the time for reviewing instructions; searching existing data sources; gathering or maintaining the needed data; and reviewing the information. For information or a copy of the paperwork package submitted to OMB, contact Robert Brogan at 202–493–6292.

OMB is required to make a decision concerning the collection of information requirements contained in this interim final rule between 30 and 60 days after

publication of this document in the **Federal Register**.

FRA cannot impose a penalty on persons for violating information collection requirements which do not display a current OMB control number, if required. FRA intends to obtain current OMB control numbers for any new information collection requirements resulting from this rulemaking action prior to the effective date of this final rule. The OMB control number, when assigned, will be announced by separate notice in the **Federal Register**.

D. Federalism Implications

Executive Order 13132, entitled ''Federalism,'' issued on August 4, 1999, requires that each agency ''in a separately identified portion of the preamble to the regulation as it is to be issued in the **Federal Register**, provide to the Director of the Office of Management and Budget a federalism summary impact statement, which consists of a description of the extent of the agency's prior consultation with State and local officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of State and local officials have been met.'' FRA believes it is in compliance with Executive Order 13132. This final rule will not have a substantial effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. This final rule will not have federalism implications that impose substantial direct compliance costs on State and local governments.

In addition, FRA notes that the public docket in this proceeding has been open for over four years. Virtually all comments received from State and local governments support a federal reflectorization requirement.

Under 49 U.S.C. 20106, issuance of this regulation preempts any State law, rule, regulation, order, or standard covering the same subject matter, except a provision to eliminate or reduce an essentially local safety hazard, that is not incompatible with Federal law or regulation and does not unreasonably burden interstate commerce. (*See* discussion in the section-by-section analysis of § 224.13).

E. Environmental Impact

FRA has evaluated this final rule in accordance with its ''Procedures for Considering Environmental Impacts'' (FRA's Procedures) (64 FR 28545, May 26, 1999) as required by the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), other environmental statutes, Executive Orders, and related regulatory requirements. FRA has determined that this final rule is not a major FRA action (requiring the preparation of an environmental impact statement or environmental assessment) because it is categorically excluded from detailed environmental review pursuant to section 4(c) of FRA's Procedures. 64 FR 28547, May 26, 1999. Section 4(c) of FRA's Procedures identifies twenty classes of FRA actions that are categorically excluded from the requirements for conducting a detailed environmental review. FRA further considered this final rule in accordance with section 4(c) and (e) of FRA's Procedures to determine if extraordinary circumstances exist with respect to this final rule that might trigger the need for a more detailed environmental review. After conducting this review, FRA has determined that extraordinary circumstances do not exist that might trigger the need for a more detailed environmental review. As a result, FRA finds that this regulation is not a major Federal action significantly affecting the quality of the human environment.

F. Unfunded Mandates Reform Act of 1995

Pursuant to Section 201 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, 2 U.S.C. 1531), each Federal agency ''shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law).'' Section 202 of the Act (2 U.S.C. 1532) further requires that ''before promulgating any general notice of proposed rulemaking that is likely to result in the promulgation of any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $120,700,000 or more (as adjusted for inflation) in any 1 year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement'' detailing the effect on State, local, and tribal governments and the private sector. This proposed rule will not result in the expenditure, in the aggregate, of $120,700,000 or more in any one year, and thus preparation of such a statement is not required.

G. Energy Impact

Executive Order 13211 requires Federal agencies to prepare a Statement of Energy Effects for any ''significant energy action.'' 66 FR 28355, May 22, 2001. Under the Executive Order, a ''significant energy action'' is defined as any action by an agency (normally published in the **Federal Register**) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking: (1)(i) That is a significant regulatory action under Executive Order 12866 or any successor order, and (ii) that is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) that is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. FRA has evaluated this final rule in accordance with Executive Order 13211. FRA has determined that this final rule is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Consequently, FRA has determined that this regulatory action is not a ''significant energy action'' within the meaning of Executive Order 13211.

H. Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, *etc.*). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78) or you may visit *http://dms.dot.gov.*

List of Subjects in 49 CFR Part 224

Incorporation by reference, Penalties, Railroad locomotive safety, Railroad safety, and Reporting and recordkeeping requirements.

The Rule

■ In consideration of the foregoing, FRA amends chapter II, subtitle B, of title 49, Code of Federal Regulations to add part 224 as follows:

PART 224—REFLECTORIZATION OF RAIL FREIGHT ROLLING STOCK

Subpart A—General

Sec.

Authority: 49 U.S.C. 20103, 20107, 20148 and 21301; 28 U.S.C. 2461; and 49 CFR 1.49.

Subpart A—General

§ 224.1 Purpose and scope.

(a) The purpose of this part is to reduce highway-rail grade crossing accidents and deaths, injuries, and property damage resulting from those accidents, by enhancing the conspicuity of rail freight rolling stock so as to increase its detectability by motor vehicle operators at night and under conditions of poor visibility.

(b) In order to achieve cost-effective mitigation of collision risk at highway-rail grade crossings, this part establishes the duties of freight rolling stock owners (including those who manage maintenance of freight rolling stock, supply freight rolling stock for transportation, or offer freight rolling stock in transportation) and railroads to progressively apply retroreflective material to freight rolling stock, and to periodically inspect and maintain that material. Freight rolling stock owners, however, are under no duty to install, clean or otherwise maintain, or repair reflective material except as specified in this part.

(c) This part establishes a schedule for the application of retroreflective material to rail freight rolling stock and prescribes standards for the application, inspection, and maintenance of retroreflective material to rail freight rolling stock for the purpose of enhancing its detectability at highway-rail grade crossings. This part does not restrict a freight rolling stock owner or railroad from applying retroreflective material to freight rolling stock for other purposes if not inconsistent with the recognizable pattern required by this part.

§ 224.3 Applicability.

This part applies to all railroad freight cars and locomotives that operate over a public or private highway-rail grade crossing and are used for revenue or work train service, except:

(a) Freight rolling stock that operates only on track inside an installation that is not part of the general railroad system of transportation;

(b) Rapid transit operations in an urban area that are not connected to the general railroad system of transportation; or

(c) Locomotives and passenger cars used exclusively in passenger service.

§ 224.5 Definitions.

Administrator means the Administrator of the Federal Railroad Administration or the Administrator's delegate.

Associate Administrator means the Associate Administrator for Safety, Federal Railroad Administration, or the Associate Administrator's delegate.

Damaged means scratched, broken, chipped, peeled, or delaminated.

Flat car means a car having a flat floor or deck on the underframe with no sides, ends or roof (including spine cars, articulated and mult-unit intermodal cars).

Freight rolling stock means:

(1) Any locomotive subject to part 229 of this chapter used to haul or switch freight cars (whether in revenue or work train service); and

(2) Any railroad freight car subject to part 215 of this chapter (including a car stenciled MW pursuant to § 215.305).

Freight rolling stock owner means any person who owns freight rolling stock, is a lessee of freight rolling stock, manages the maintenance or use of freight rolling stock on behalf of an owner or one or more lessors or lessees, or otherwise controls the maintenance or use of freight rolling stock.

Locomotive has the meaning assigned by § 229.5 of this chapter, but for purposes of this part applies only to a locomotive used in the transportation of freight or the operation of a work train.

Obscured means concealed or hidden (*i.e.*, covered up, as where a layer of paint or dense chemical residue blocks all incoming light); this term does not refer to ordinary accumulations of dirt, grime, or ice resulting from the normal railroad operating environment.

Person means an entity of any type covered under 1 U.S.C. 1, including but not limited to the following: A railroad; a manager, supervisor, official, or other employee or agent of a railroad; any owner, manufacturer, lessor, or lessee of railroad equipment, track or facilities; any independent contractor providing goods or services to a railroad; and any employee of such an owner, manufacturer, lessor, lessee, or independent contractor.

Railroad means all forms of non-highway ground transportation that run on rails or electromagnetic guideways, including high speed ground transportation systems that connect metropolitan areas, without regard to whether they use new technologies not associated with traditional railroads.

Railroad freight car has the meaning assigned by § 215.5 of this chapter.

Tank car means a rail car, the body of which consists of a tank for transporting liquids.

Unqualified retroreflective sheeting means engineering grade sheeting, super engineering grade sheeting (enclosed lens) or high-intensity type sheeting (ASTM Type I, II, III, or IV Sheeting) as described in ASTM International Standard D–4956–01a, ''Standard Specification for Retroreflective Sheeting for Traffic Control.''

Work train means a non-revenue service train used for the maintenance and upkeep service of the railroad.

§ 224.7 Waivers.

(a) Any person subject to a requirement of this part may petition the Administrator for a waiver of compliance with such requirement. The filing of such a petition does not affect that person's responsibility for compliance with that requirement while the petition is being considered.

(b) Each petition for waiver under this section shall be filed in the manner and contain the information required by part 211 of this chapter.

(c) If the Administrator finds that a waiver of compliance is in the public interest and is consistent with railroad safety, the Administrator may grant the waiver subject to any conditions that the Administrator deems necessary.

§ 224.9 Responsibility for compliance.

(a) Freight rolling stock owners, railroads, and (with respect to certification of material) manufacturers of retroreflective material, are primarily responsible for compliance with this part. However, any person that performs any function or task required by this part (including any employee, agent, or contractor of the aforementioned), must perform that function in accordance with this part.

(b) Any person performing any function or task required by this part shall be deemed to have consented to FRA inspection of the person's facilities and records to the extent necessary to determine whether the function or task is being performed in accordance with the requirements of this part.

§ 224.11 Penalties.

(a) Any person (including but not limited to a railroad; any manager,

supervisor, official, or other employee or agent of a railroad; any owner, manufacturer, lessor, or lessee of railroad equipment, track, or facilities; and any employee of such owner, manufacturer, lessor, lessee, or independent contractor) who violates any requirement of this part or causes the violation of any such requirement is subject to a civil penalty of at least $550, but not more than $11,000 per violation, except that: Penalties may be assessed against individuals only for willful violations, and, where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury to persons, or has caused death or injury, a penalty not to exceed $27,000 per violation may be assessed. Each day a violation continues shall constitute a separate offense. Appendix A to this part contains a schedule of civil penalty amounts used in connection with this part.

(b) Any person who knowingly and willfully falsifies a record or report required by this part is subject to criminal penalties under 49 U.S.C. 21311.

§ 224.13 Preemptive effect.

Under 49 U.S.C. 20106, issuance of this part preempts any State law, rule, regulation, or order covering the same subject matter, except an additional or more stringent law, rule, regulation, or order that is necessary to eliminate or reduce an essentially local safety hazard; that is not incompatible with a law, rule, regulation, or order of the United States Government; and that does not unreasonably burden interstate commerce.

§ 224.15 Special approval procedures.

(a) *General.* The following procedures govern consideration and action upon requests for special approval of alternative standards under § 224.103(e).

(b) *Petitions.* (1) Each petition for special approval of an alternative standard shall contain—

(i) The name, title, address, and telephone number of the primary person to be contacted with regard to the petition;

(ii) The alternative proposed, in detail, to be substituted for the particular requirements of this part; and

(iii) Appropriate data and analysis establishing that the alternative will provide at least an equivalent level of safety and meet the requirements of § 224.103(e).

(2) Three copies of each petition for special approval of an alternative standard shall be submitted to the Docket Clerk, Office of Chief Counsel, Federal Railroad Administration, RCC–10, Mail Stop 10, 1120 Vermont Ave., NW., Washington, DC 20590.

(c) *Notice.* FRA will publish a notice in the **Federal Register** concerning each petition under paragraph (b) of this section.

(d) *Public comment.* FRA will provide a period of not less than 30 days from the date of publication of the notice in the **Federal Register** during which any person may comment on the petition.

(1) Each comment shall set forth specifically the basis upon which it is made, and contain a concise statement of the interest of the commenter in the proceeding.

(2) Each comment shall be submitted to the DOT Central Docket Management System, Nassif Building, Room Pl–401, 400 Seventh Street, SW., Washington, DC 20590, and shall contain the assigned docket number which appears in the **Federal Register** for that proceeding. Such submission may be in written or electronic form consistent with the standards and requirements established by the Central Docket Management System and posted on its Web site at *http://dms.dot.gov.*

(3) In the event FRA determines that it requires additional information to appropriately consider the petition, FRA will conduct a hearing on the petition in accordance with the procedures provided in § 211.25 of this chapter.

(e) *Disposition of petitions.* (1) If FRA finds that the petition complies with the requirements of this section and that the proposed alternative standard is acceptable or changes are justified, or both, the petition will be granted, normally within 90 days of its receipt. The Associate Administrator may determine the applicability of other technical requirements of this part when rendering a decision on the petition. If the petition is neither granted nor denied within 90 days, the petition remains pending for decision. FRA may attach special conditions to the approval of the petition. Following the approval of a petition, FRA may reopen consideration of the petition for cause stated.

(2) If FRA finds that the petition does not comply with the requirements of this section, or that the proposed alternative standard is not acceptable or that the proposed changes are not justified, or both, the petition will be denied, normally within 90 days of its receipt.

(3) When FRA grants or denies a petition, or reopens consideration of a petition, written notice is sent to the petitioner and other interested parties and a copy of the notice is placed in the electronic docket of the proceeding.

Subpart B—Application, Inspection, and Maintenance of Retroreflective Material

§ 224.101 General requirements.

All rail freight rolling stock subject to this part shall be equipped with retroreflective sheeting that conforms to the requirements of this part. Notwithstanding any other provision of this chapter, the application, inspection, and maintenance of that sheeting shall be conducted in accordance with this subpart or in accordance with an alternative standard providing at least an equivalent level of safety after special approval of FRA under § 224.15.

§ 224.103 Characteristics of retroreflective sheeting.

(a) *Construction.* Retroreflective sheeting applied pursuant to this part shall consist of a smooth, flat, transparent exterior film with microprismatic retroreflective elements embedded in or suspended beneath the film so as to form a non-exposed retroreflective optical system.

(b) *Color.* Retroreflective sheeting applied pursuant to this part shall be yellow or white as specified by the chromaticity coordinates of ASTM International's Standard D 4956–01a, ''Standard Specification for Retroreflective Sheeting for Traffic Control.'' The Director of the Federal Register approves the incorporation by reference of this standard in this section in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. You may obtain a copy of the incorporated standard from ASTM International, 100 Barr Harbor Drive, P.O. Box C700, West Conshohocken, PA 19428–2959. You may inspect a copy of the incorporated standard at the Federal Railroad Administration, Docket Clerk, 1120 Vermont Ave., NW., Suite 7000, or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

(c) *Performance.* Retroreflective sheeting applied pursuant to this part shall meet the requirements of ASTM D 4956–01a, for Type V Sheeting, except for the photometric requirements, and shall, as initially applied, meet the minimum photometric performance requirements specified in Table 1 of this subpart.

TABLE 1 OF SUBPART B.—MINIMUM PHOTOMETRIC PERFORMANCE (COEFFICIENT OF RETROREFLECTION (R_A) IN CANDELA/LUX/METER^2) REQUIREMENT FOR RETROREFLECTIVE SHEETING

Entrance angle	Observation angle			
	0.2 Degree		0.5 Degree	
	Yellow	White	Yellow	White
−4°	400	600	100	160
30°	220	350	45	75

(d) *Certification.* The characters ''FRA–224'', constituting the manufacturer's certification that the retroreflective sheeting conforms to the requirements of paragraphs (a) through (c) of this section, shall appear at least once on the exposed surface of each piece of sheeting in the final application. The characters shall be a minimum of three millimeters high, and shall be permanently stamped, etched, molded, or printed within the product and each certification shall be spaced no more than four inches apart.

(e) *Alternative standards.* Upon petition by a freight rolling stock owner or railroad under § 224.15, the Associate Administrator may approve an alternative technology as providing equivalent safety. Any such petition shall provide data and analysis sufficient to establish that the technology will result in conspicuity and durability at least equal to sheeting described in paragraphs (a) through (c) of this section applied in accordance with this part and will present a recognizable visual target that is suitably consistent with freight rolling stock equipped with retroreflective sheeting that meets the technical requirements of this part to provide the intended warning to motorists.

§ 224.105 Sheeting dimensions and quantity.

Retroreflective sheeting shall be applied along the length of each railroad freight car and locomotive side as described in § 224.106. Retroreflective sheeting applied under this part shall be applied in strips 4 inches wide and 18 or 36 inches long, unless otherwise specified. The amount of retroreflective sheeting to be applied to each car or locomotive subject to this part is dependent on the length of the car or locomotive and the color of the sheeting. For purposes of this part, the length of a railroad freight car or locomotive is measured from endsill to endsill, exclusive of the coupler and draft gear. Each side of a railroad freight car subject to this part, including each unit of multi-unit cars, and each side of a locomotive subject to this part must be equipped with at least the minimum amount of retroreflective sheeting specified in Table 2 of this subpart.

TABLE 2 OF SUBPART B.—MINIMUM QUANTITY REQUIREMENT FOR RETROREFLECTIVE SHEETING ON FREIGHT ROLLING STOCK

Freight car or locomotive length	Minimum area of retroreflective sheeting required (per car/locomotive side)—yellow sheeting (ft^2)	Minimum area of retroreflective sheeting required (per car/locomotive side)—white sheeting (ft^2)
Less than 50 ft	3.5	4
50 ft. to 60 ft	4	5
Over 60 ft. to 70 ft	4.5	5.5
Over 70 ft. to 80 ft	5	6
Over 80 ft. to 90 ft	5.5	7
Over 90 ft. to 100 ft[1]	6	7.5

[1] Freight cars or locomotives over 100 ft. in length must be equipped with an additional one-half square foot of sheeting on each side for every additional 10 feet of length.

§ 224.106 Location of retroreflective sheeting.

(a) *Railroad freight cars.* The retroreflective sheeting shall be applied along the length of each railroad freight car side in the manner provided by a uniform industry standard approved by the Associate Administrator that provides for distribution of material along the length of each car and as close as practicable to 42 inches above the top of rail. In the event such an industry standard is not proffered, or is not approved by the Associate Administrator, the criteria set forth in this subpart shall apply. Retroreflective sheeting applied under this part must be located clear of appurtenances and devices such as ladders and other safety appliances, pipes, or other attachments that may obscure its visibility. Retroreflective sheeting need not be applied to discontinuous surfaces such as bolts, rivets, door hinges, or other irregularly shaped areas that may prevent the sheeting from adhering to the car sides. In addition, retroreflective sheeting need not be applied over existing or required car stencils and markings. If necessary to avoid appurtenances, discontinuous surfaces, or existing or required car markings or stencils, a 4x18 inch strip of retroreflective sheeting may be separated into two 4x9 inch strips, or a 4x36 inch strip may be separated into four 4x9 inch strips, and applied on either side of the appurtenance, discontinuous surface, or car markings or stencils.

(1) *General rule.* On railroad freight cars other than flat cars and tank cars, retroreflective sheeting shall be applied in either a vertical or horizontal pattern along the length of the car sides, with the bottom edge of the sheeting as close as practicable to 42 inches above the top of rail. Retroreflective sheeting shall not be applied below the side sill.

(i) *Vertical application.* If retroreflective sheeting is applied in a vertical pattern, at least one 4x36 inch strip or two 4x18 inch strips, one above the other, shall be applied as close to

each end of the car as practicable. Between these two vertical end strips, a minimum of one 4x18 inch strip shall be applied at least every 12 feet. *See* Figures 1, 2, and 3.

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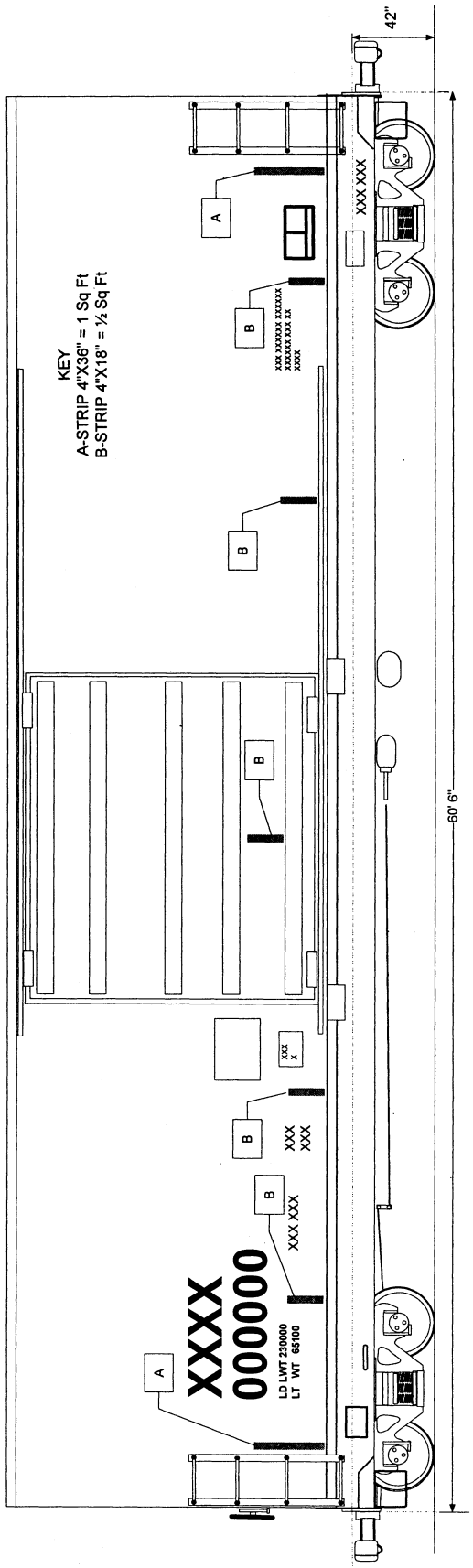

Figure 1
Yellow vertical reflective sheeting (4.5 sq. ft.) pattern applied to a typical 60' 6" Box Car (additional sheeting required per 49 CFR 224.105 if white sheeting is applied in lieu of yellow)

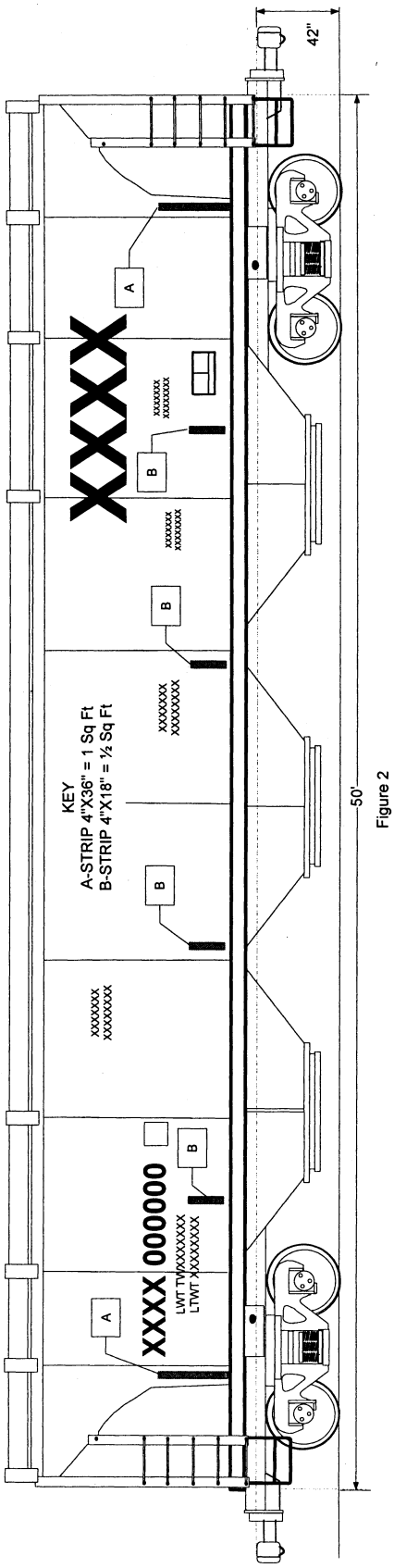

Figure 2
Yellow vertical reflective sheeting (4.0 sq. ft.) pattern applied to a typical 50 feet Covered Hopper Car (additional sheeting required per 49 CFR 224.105 if white sheeting is applied in lieu of yellow)

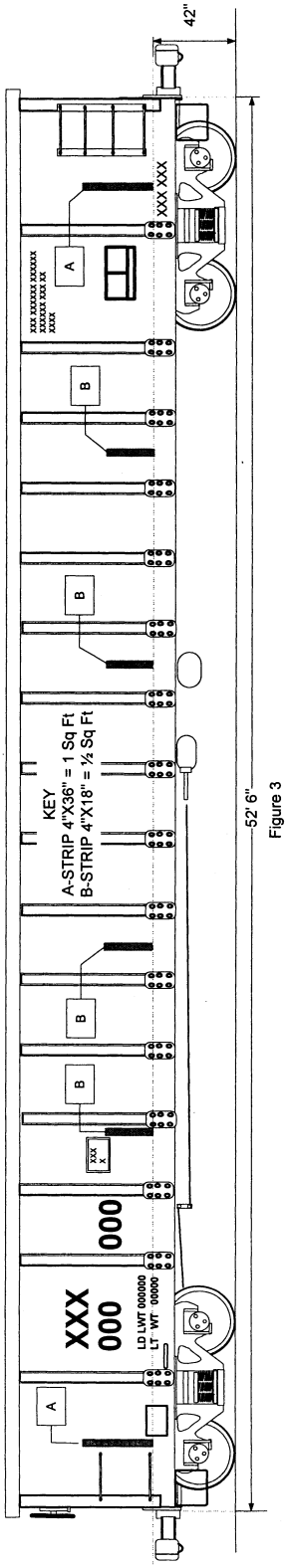

Figure 3
Yellow vertical reflective sheeting (4.0 sq. ft.) pattern applied to a typical 52' 6" Gondola Car (additional sheeting required per 49 CFR 224.105 if white sheeting is applied in lieu of yellow

(ii) *Horizontal application.* If retroreflective sheeting is applied in a horizontal pattern, at least two 4x18 inch strips, one above the other, shall be applied as close to each end of the car as practicable. Between these two end strips, a minimum of one 4x18 inch strip shall be applied at least every 12 feet. *See* Figures 4, 5, and 6.

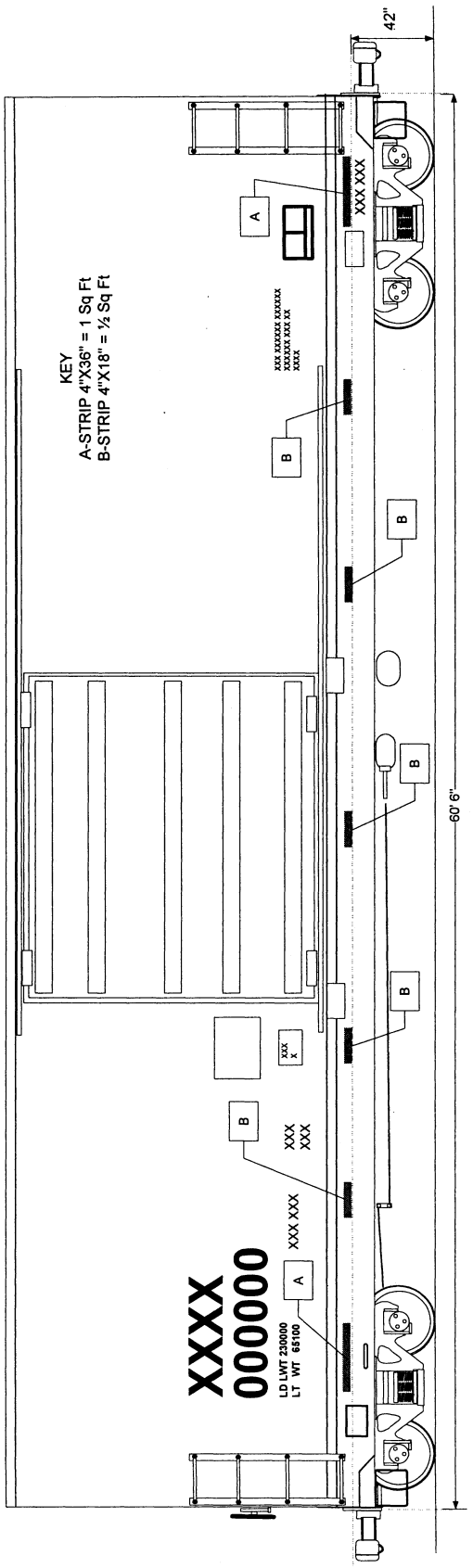

Figure 4
Alternate Pattern
Yellow horizontal reflective sheeting (4.5 sq. ft.) pattern applied to a typical 60' 6" Box Car (additional sheeting required per 49 CFR 224.105 if white sheeting is applied in lieu of yellow)

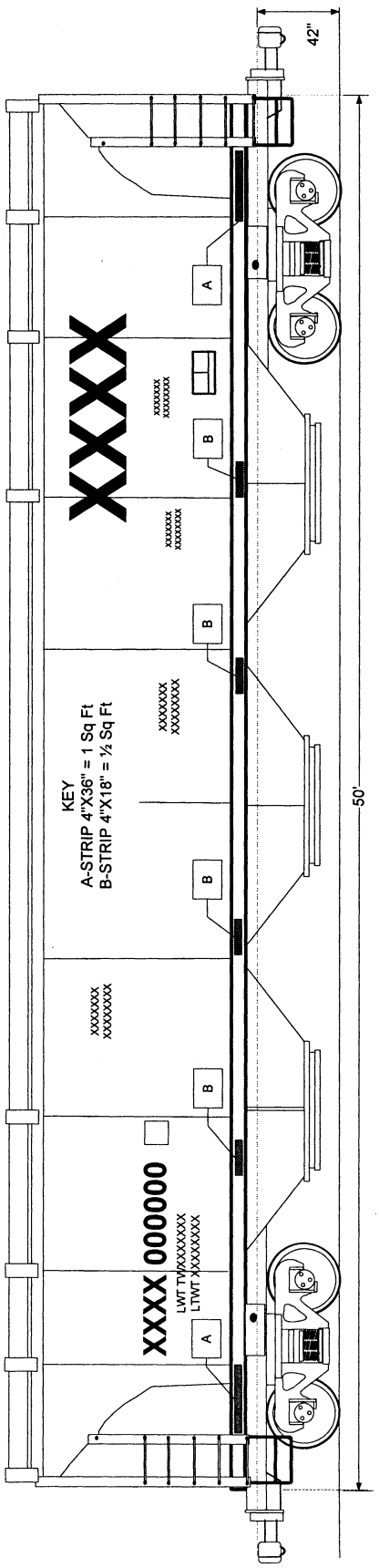

Figure 5
Alternate Pattern
Yellow horizontal reflective sheeting (4.0 sq. ft.) pattern applied to a typical 50 feet Covered Hopper Car (additional sheeting required per 49 CFR 224.105 if white sheeting is applied in lieu of yellow)

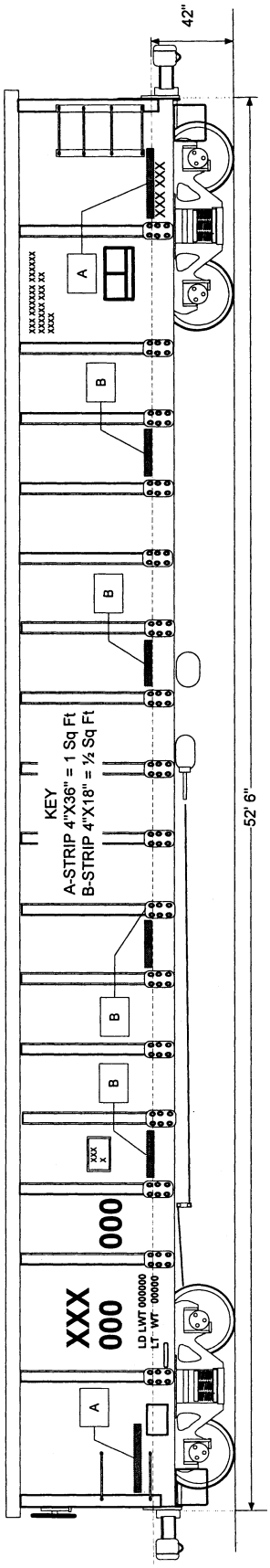

Figure 6
Alternate Pattern
Yellow horizontal reflective sheeting (4.0 sq. ft.) pattern applied to a typical 52' 6" Gondola Car (additional sheeting required per 49 CFR 224.105 if white sheeting is applied in lieu of yellow

(2) *Tank cars.* On tank cars, retroreflective sheeting shall be applied vertically to each car side and centered on the horizontal centerline of the tank, or as near as practicable. If it is not practicable to safely apply the sheeting centered vertically about the horizontal centerline of the tank, the sheeting may be applied vertically with its top edge no higher than the horizontal centerline of the tank. A minimum of either one 4x36 inch strip or two 4x18 inch strips, one above the other, shall be applied as close to each end of the car as practicable. Between these two end strips, a minimum of one 4x18 inch strip shall be applied at least every 12 feet. Retroreflective sheeting applied under this part shall not be located in the spillage area directly beneath the manway used to load and unload the tank. *See* Figures 7 and 8.

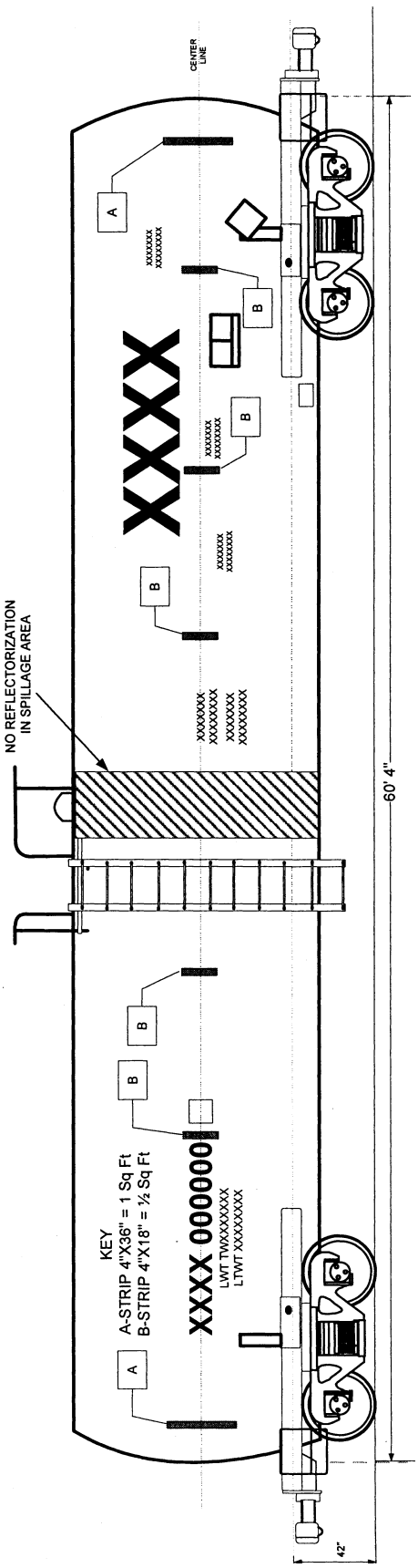

Figure 7
Yellow vertical reflective sheeting (4.5 sq. ft.) pattern applied to a typical Tank Car between 60' and 70' (additional sheeting required per 49 CFR 224.105 if white sheeting is applied in lieu of yellow)

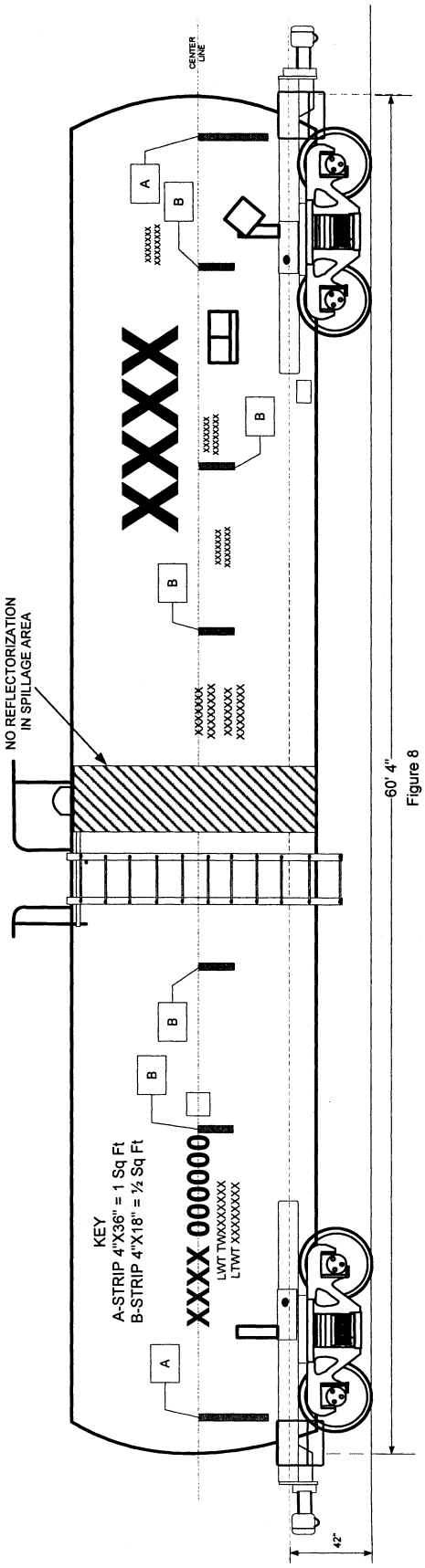

Figure 8
Yellow vertical reflective sheeting (4.5 sq. ft.) pattern applied to a typical Tank Car between 60' and 70' (additional sheeting required per 49 CFR 224.105 if white sheeting is applied in lieu of yellow)

(3) *Flat cars.* On flat cars, retroreflective sheeting shall be applied in a horizontal pattern along the length of the side sill with the bottom edge of the sheeting no lower than the bottom of the side sill and the top edge of the sheeting no higher than the top of the car deck or floor. At least two 4x18 inch strips, one above the other, shall be applied as close to each end of the car as practicable. If the side sill is less than 8 inches wide, the two 4x18 inch strips may be applied one next to the other, dividing the strips into nine inch segments as necessary in accordance with paragraph (a) of this section. Between the two end strips, a minimum of one 4x18 inch strip shall be applied at least every 12 feet. *See* Figure 4. If a car has a separate rack structure, retroreflective sheeting may be applied to the flatcar portion only in accordance with the requirements of this section.

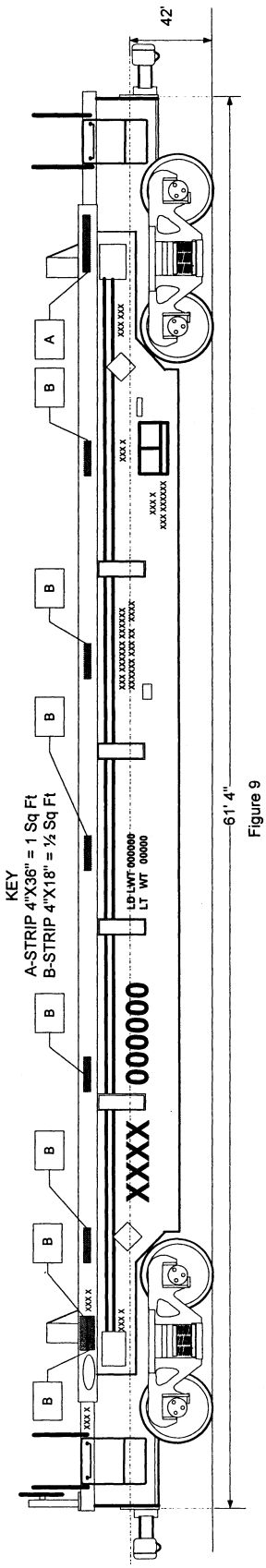

Figure 9
Yellow horizontal reflective sheeting (4.5 sq. ft.) pattern applied to a typical Flat Car (additional sheeting required per 49 CFR 224.105 if white sheeting is applied in lieu of yellow)

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(4) *Cars of special construction.* This paragraph applies to any car the design of which is not compatible with the patterns of application otherwise provided in this section. Retroreflective sheeting shall conform as closely as practicable to the requirements of paragraphs (a)(1) through (a)(3) of this section and shall have the minimum amount of sheeting described in § 224.105 distributed along the length of each car side.

(b) *Locomotives:* Locomotives subject to this part shall be equipped with at least the minimum amounts of retroreflective sheeting required by § 224.105 spaced as uniformly as practicable along the length of the locomotive sides as close as practicable to 42 inches from the top of the rail.

§ 224.107 Implementation schedule.

(a) *Railroad freight cars.* All railroad freight cars subject to this part must be equipped with retroreflective sheeting conforming to this part by May 31, 2015. If a car already has reflective material applied that does not meet the standards of this part, it is not necessary to remove the material unless its placement interferes with the placement of the sheeting required by this part.

(1) *New cars.* Retroreflective sheeting conforming to this part must be applied to all cars constructed after May 31, 2005, before the cars are placed in service.

(2) *Existing cars without retroreflective sheeting.*

(i) If, as of January 3, 2005, a car subject to this part is not equipped on each side with at least one square foot of retroreflective sheeting as specified in paragraph (a)(3) of this section, retroreflective sheeting conforming to this part must be applied to the car at the earliest of the following two occasions occurring after May 31, 2005 or in accordance with paragraph (a)(2)(ii) of this section:

(A) When the car is repainted or rebuilt; or

(B) Within nine months (270 calendar days) after the car first undergoes a single car air brake test as prescribed by § 232.305 of this chapter.

(ii) A freight rolling stock owner may elect not to follow the schedule in paragraph (a)(2)(i) of this section if, not later than July 1, 2005, the freight rolling stock owner submits to FRA a completed Reflectorization Implementation Compliance Report certifying that the cars in the owner's fleet subject to this part will be equipped with retroreflective sheeting as required by this part in accordance with the schedule specified in Table 3 of this subpart. *See* Appendix B of this part for Reflectorization Implementation Compliance Report form.

TABLE 3 OF SUBPART B.—ALTERNATIVE SCHEDULE FOR APPLICATION OF RETROREFLECTIVE MATERIAL TO FREIGHT CARS PER § 224.107(a)(2)(ii).

(A) [1]	(B) (percent)
May 31, 2007	20
May 31, 2008	30
May 31, 2009	40
May 31, 2010	50
May 31, 2011	60
May 31, 2012	70
May 31, 2013	80
May 31, 2014	90
May 31, 2015	100

[1] Column (A) indicates the date by which the minimum percentage of an owner's freight cars specified in column (B) must be equipped with retroreflective sheeting conforming to this part.

(A) Thereafter, the designated fleet shall be equipped with retroreflective sheeting according to the schedule specified in Table 3 of this subpart;

(B) No later than July 1, 2007, the freight rolling stock owner shall submit to FRA an updated Reflectorization Implementation Compliance Report showing which cars of the fleet subject to this part were equipped with retroreflective sheeting as required by this part during the initial 24-month implementation period. Thereafter, updated Reflectorization Implementation Compliance Reports shall be submitted annually, no later than July 1 of each year, for the duration of the 10-year implementation period. *See* Appendix B of this part.

(C) If, following the conclusion of the initial 24-month period or any 12-month period thereafter, the percentage requirements of this section have not been met—

(*1*) The freight rolling stock owner shall be considered in violation of this part;

(*2*) The freight rolling stock owner shall, within 60 days after the close of the period, report the failure in writing to the Associate Administrator;

(*3*) The requirements of paragraph (a)(2)(i) of this section shall apply to all railroad freight cars subject to this part in the freight rolling stock owner's fleet; and

(*4*) The fleet owner shall take such additional action as may be necessary to achieve future compliance.

(D) Cars to be retired shall be included in the fleet total until they are retired.

(3) *Existing cars with retroreflective sheeting.* If as of January 3, 2005, a car is equipped on each side with at least one square foot of retroreflective sheeting, uniformly distributed over the length of each side, that car shall be considered in compliance with this part through May 31, 2015, provided the sheeting is not unqualified retroreflective sheeting, and provided the freight rolling stock owner files a completed Reflectorization Implementation Compliance Report with FRA no later than July 1, 2005, identifying the cars already so equipped. *See* Appendix B of this part for Reflectorization Implementation Compliance Report form.

(b) *Locomotives.* Except as provided in paragraph (b)(4) of this section, all locomotives subject to this part must be equipped with conforming retroreflective sheeting by May 31, 2010. If a locomotive already has reflective material applied that does not meet the standards of this part, it is not necessary to remove the material unless its placement interferes with the placement of the sheeting required by this part.

(1) *New locomotives.* Retroreflective sheeting conforming to this part must be applied to all locomotives constructed after May 31, 2005, before the locomotives are placed in service.

(2) *Existing locomotives without retroreflective sheeting.* (i) If as of January 3, 2005 a locomotive subject to this part is not equipped with the minimum amount of retroreflective sheeting specified in paragraph (b)(3) of this section, retroreflective sheeting conforming to this part must be applied to the locomotive not later than the first biennial inspection performed pursuant to § 229.29 of this chapter occurring after May 31, 2005.

(ii) A freight rolling stock owner may elect not to follow the schedule in paragraph (b)(2)(i) of this section, if not later than July 1, 2005, the freight rolling stock owner submits to FRA a Reflectorization Implementation Compliance Report certifying that the locomotives in the owner's fleet subject to this part will be equipped with retroreflective sheeting as required by this part in accordance with the schedule specified in Table 4 of this subpart. *See* Appendix B of this part.

TABLE 4 OF SUBPART B.—ALTERNATIVE SCHEDULE FOR APPLICATION OF RETROREFLECTIVE MATERIAL TO LOCOMOTIVES PER § 224.107(b)(2)(ii).

(A) [1]	(B) (percent)
May 31, 2007	40
May 31, 2008	60

TABLE 4 OF SUBPART B.—ALTERNATIVE SCHEDULE FOR APPLICATION OF RETROREFLECTIVE MATERIAL TO LOCOMOTIVES PER § 224.107(b)(2)(ii).—Continued

(A) [1]	(B) (percent)
May 31, 2009	80
May 31, 2010	100

[1] Column (A) indicates the date by which the minimum percentage of an owner's locomotives specified in column (B) must be equipped with retroreflective sheeting conforming to this part.

(A) Thereafter, the designated locomotive fleet shall be equipped with retroreflective sheeting according to the requirements of this paragraph (b)(2)(ii);

(B) No later than July 1, 2007, the freight rolling stock owner shall submit to FRA an updated Reflectorization Implementation Compliance Report showing which locomotives of the fleet subject to this part were equipped with retroreflective sheeting as required by this part during the initial 24 month implementation period. Thereafter, updated Reflectorization Implementation Compliance Reports shall be submitted annually, no later than July 1 of each year, for the duration of the 5-year implementation period. *See* Appendix B of this part.

(C) If, following the conclusion of the initial 24-month period or any 12-month period thereafter, the percentage requirements of this section have not been met—

(*1*) The freight rolling stock owner shall be considered in violation of this part;

(*2*) The freight rolling stock owner shall, within 60 days after the close of the period, report the failure in writing to the Associate Administrator;

(*3*) The requirements of paragraph (b)(2)(i) of this section shall apply to all locomotives subject to this part in the freight rolling stock owner's fleet; and

(*4*) The fleet owner shall take such additional action as may be necessary to achieve future compliance.

(D) Locomotives to be retired shall be included in the fleet total until they are retired.

(3) *Existing locomotives with retroreflective sheeting.* If as of January 3, 2005, a locomotive is equipped on each side with at least one square foot of retroreflective sheeting, that locomotive shall be considered in compliance with this part through May 31, 2015, provided the existing material is not unqualified retroreflective sheeting, and provided the freight rolling stock owner files a Reflectorization Implementation Compliance Report with FRA no later than July 1, 2005, identifying the locomotives already so equipped. *See* Appendix B of this part. If, as of January 3, 2005, a locomotive is equipped with unqualified retroreflective sheeting, the locomotive will be considered in compliance with this part through May 31, 2015, provided the locomotive is equipped with a minimum of 3 square feet of retroreflective material on each side and provided the freight rolling stock owner files a Reflectorization Implementation Compliance Report with FRA no later than July 1, 2005, identifying the locomotives already so equipped. *See* Appendix B of this part.

(4) Each railroad that has fewer than 400,000 annual employee work hours, and does not share locomotive power with another railroad with 400,000 or more annual employee work hours, may bring its locomotive fleet into compliance according to the following schedule: fifty percent of the railroad's locomotives must be retrofitted pursuant to § 224.106(b) within five years of the effective date of this part and one hundred percent must be retrofitted pursuant to § 224.106(b) within 10 years of the effective date of this part. If a railroad with fewer than 400,000 annual employee work hours shares locomotive power with a railroad with 400,000 or more annual employee work hours, the smaller railroad must comply with the requirements of paragraphs (b)(2) and (3) of this section.

§ 224.109 Inspection, repair, and replacement.

(a) *Railroad freight cars.* Retroreflective sheeting on railroad freight cars subject to this part must be visually inspected for presence and condition whenever a car undergoes a single car air brake test required under § 232.305 of this chapter. If at the time of inspection more than 20 percent of the amount of sheeting required under § 224.105 on either side of a car is damaged, obscured, or missing, the inspecting railroad or contractor shall promptly notify the car owner of the damaged, obscured, or missing sheeting. The inspecting railroad or contractor shall retain a written or electronic copy of each such notification made for at least two years from the date of the notice and shall make these records available for inspection and copying by the FRA upon request. Any car owner notified of a defect under this section shall have nine months (270 calendar days) from the date of notification to repair or replace the damaged, obscured, or missing sheeting.

(b) *Locomotives.* Retroreflective sheeting must be visually inspected for presence and condition when the locomotive receives the annual inspection required under § 229.27 of this chapter. If at the time of inspection more than 20 percent of the amount of sheeting required under § 224.105 on either side of a locomotive is damaged, obscured, or missing, that damaged, obscured, or missing sheeting must be repaired or replaced. If conditions at the time of inspection are such that adequate repairs cannot be made, replacement material can not be applied, or if sufficient replacement material is not available, such application may be completed at the next forward location where conditions permit, provided a record of the defect is maintained in the locomotive cab or in a secure and accessible electronic database to which FRA is provided access on request.

§ 224.111 Renewal.

Regardless of condition, retroreflective sheeting required under this part must be replaced with new sheeting no later than ten years after the date of initial installation. For purposes of this section, May 31, 2005 shall be considered the initial date of installation for freight cars and locomotives covered by § 224.107(a)(3) or 224.107(b)(3).

Appendix A to Part 224—Schedule of Civil Penalties [1]

Subpart B—Application, Inspection, and Maintenance of Retroreflective Material

[1] A penalty may be assessed against an individual only for a willful violation. The Administrator reserves the right to assess a penalty of up to $27,000 for any violation where circumstances warrant. *See* 49 CFR part 209, Appendix A.

Section	Violation ($)	Willful violation ($)
§ 224.103 Characteristics of retroreflective sheeting:		
(a)–(d) Retroreflective sheeting applied does not meet the requirements of § 224.103	2,500	5,000
§ 224.105 Sheeting dimensions and quantity:		
Failure to apply minimum amount of retroreflective sheeting in accordance with Table 2	2,500	5,000
Applying retroreflective sheeting of wrong dimensions	2,500	5,000
§ 224.106 Location of retroreflective sheeting:		
(a), (b) Applying retroreflective sheeting in nonconforming pattern	2,000	4,000
§ 224.107 Implementation schedule:		
(a)(1), (b)(1) Failure to apply retroreflective sheeting to new freight car or locomotive before equipment placed in service	5,000	7,500
(a)(2), (b)(2), (b)(4) Failure to apply retroreflective sheeting to existing freight car or locomotive in accordance with minumum schedule of paragraphs (a)(2), (b)(2), or (b)(4)	5,000	7,500
§ 224.109 Inspection, repair, and replacement:		
(a) Failure to perform inspection	5,000	7,500
Failure to properly notify car owner of defect	2,500	5,000
Failure to retain written notification of defect for two years	1,500	2,500
Failure to repair defect after notification	5,000	7,500
(b) Failure to perform inspection	5,000	7,500
Failure to repair defect	5,000	7,500

Appendix B to Part 224—Reflectorization Implementation Compliance Report

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OMB No. 2130-xxxx

REFLECTORIZATION IMPLEMENTATION COMPLIANCE REPORT

Instructions for completing form:

If submitting this form to FRA as an initial Reflectorization Implementation Compliance Report in accordance with 49 CFR 224.107(a)(2)(ii) and/or (b)(2)(ii), complete Parts I, II, III and IV. If submitting this form in accordance with 49 CFR 224.107(a)(3) and/or (b)(3), complete Parts I, II, III, IV, and V.

If this form is being submitted to FRA as an updated Reflectorization Implementation Compliance Report required by 49 CFR 224.107(a)(2)(ii)(B) or (b)(2)(ii)(B), complete Parts I, II, III, and V. In Part V, report the car/locomotive number(s) identifying each freight car and locomotive equipped with retroreflective sheeting conforming to 49 CFR Part 224 during this reporting period

Part I: Identification	
Railroad or Car Owner:	
Railroad or Car Owner Reporting Code:	

Preparer Information:	
Name:	Title:
Address:	Phone:
	Fax:
	Email:

Part II: Type of Submission

☐ Initial Submission

☐ Updated Compliance Report

Part III: Identification of freight rolling stock fleet subject to 49 CFR Part 224

A. How many freight cars in your fleet are subject to 49 CFR part 224? _____

B. How many locomotives in your fleet are subject to 49 CFR part 224? _____

Part IV: Certification (Complete only if Part II: Type of Submission is Initial Submission)

By filing this Reflectorization Implementation Compliance Report and any accompanying documents or electronic files with FRA, the undersigned Freight Rolling Stock Owner is electing to follow the alternative schedules for equipping its freight rolling stock with reflective material as set forth in 49 CFR §§224.107(a)(2)(ii) and/or (b)(2)(ii). By completing, executing, and filing this Compliance Report with FRA, the undersigned Freight Rolling Stock Owner is certifying that its entire fleet of freight rolling stock subject to 49 CFR Part 224 (Part 224) will be equipped with retroreflective sheeting conforming to the requirements of Part 224 in accordance with the schedules set forth in 49 CFR §224.107(a)(2)(ii) and/or (b)(2)(ii). Failure to meet the minimum requirements of Part 224 may result in the assessment of civil penalties or other enforcement action by FRA.

Signature of Corporate Officer/Car owner:	Date:
Name:	
Title:	

Form FRA F6180.113 11/03

OMB No. 2130-xxxx

Part V: Identification of rail freight rolling stock conforming to 49 CFR Part 224

Reapplied[a]	Type (check one): Locomotive	Type (check one): Freight Car	Identification Number:	Reapplied[a]	Type (check one): Locomotive	Type (check one): Freight Car	Identification Number:
☐	☐	☐	________	☐	☐	☐	________
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a. Check if freight car/locomotive was reported in Part V of a previous Reflectorization Implementation Compliance Report as conforming to 49 CFR Part 224, but 100% of the retroreflective sheeting on the car/locomotive was replaced with sheeting conforming to Part 224 in this reporting period.

Public reporting burden for this information collection is estimated to average eight hours per response. This estimate included time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. According to the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it displays a valid OMB control number. The valid OMB control number for this collection of information is 2130-XXXX.

Form FRA F6180.113 11/03

Issued in Washington, DC on December 22, 2004.

Betty Monro,

Acting Administrator, Federal Railroad Administration.

[FR Doc. 04–28407 Filed 12–30–04; 8:45 am]

BILLING CODE 4910–06–C

Federal Register

Monday,
January 3, 2005

Part III

Department of the Treasury

Alcohol and Tobacco Tax and Trade Bureau

27 CFR Parts 7 and 25

Flavored Malt Beverage and Related Regulatory Amendments (2002R–044P); Final Rule

DEPARTMENT OF THE TREASURY

Alcohol and Tobacco Tax and Trade Bureau

27 CFR Parts 7 and 25

[TTB T.D.–21; Re: TTB Notice No. 4]

RIN 1513–AA12

Flavored Malt Beverage and Related Regulatory Amendments (2002R–044P)

AGENCY: Alcohol and Tobacco Tax and Trade Bureau, Treasury.

ACTION: Final rule; Treasury decision.

SUMMARY: The Department of the Treasury and its Alcohol and Tobacco Tax and Trade Bureau adopt as a final rule certain proposed changes to the regulations concerning the production, taxation, composition, labeling, and advertising of beer and malt beverages.

This final rule permits the addition of flavors and other nonbeverage materials containing alcohol to beers and malt beverages, but, in general, limits the alcohol contribution from such flavors and other nonbeverage materials to not more than 49% of the alcohol content of the product. However, if a malt beverage contains more than 6% alcohol by volume, not more than 1.5% of the volume of the finished product may consist of alcohol derived from flavors and other nonbeverage ingredients that contain alcohol. This final rule also amends the regulations relating to the labeling and advertising of malt beverages, and adopts a formula requirement for beers.

We issue this final rule to clarify the status of flavored malt beverages under the provisions of the Internal Revenue Code of 1986 and the Federal Alcohol Administration Act related to the production, composition, taxation, labeling, and advertising of alcohol beverages. This final rule also will ensure that consumers are adequately informed about the identity of flavored malt beverages.

DATES: This rule is effective January 3, 2006.

FOR FURTHER INFORMATION CONTACT: Charles N. Bacon, Alcohol and Tobacco Tax and Trade Bureau, Regulations and Procedures Division, P.O. Box 5056, Beverly Farms, MA 01915; telephone (978) 921–1840.

SUPPLEMENTARY INFORMATION:

Table of Contents

Notes to Readers

A. ATF–TTB Transition

Effective January 24, 2003, section 1111 of the Homeland Security Act of 2002 (Public Law 107–296, 116 Stat. 2135), divided the Bureau of Alcohol, Tobacco and Firearms (ATF) into two new agencies, the Alcohol and Tobacco Tax and Trade Bureau (TTB) in the Department of the Treasury, and the Bureau of Alcohol, Tobacco, Firearms and Explosives in the Department of Justice. The regulation and taxation of alcohol beverages remains a function of the Department of the Treasury and is the responsibility of TTB. References to the former ATF and the new TTB in this document reflect the time frame, before or after January 24, 2003.

B. Use of Plain Language

In this document, ''we,'' ''our,'' and ''us'' refer to the Department of the Treasury and/or the Alcohol and Tobacco Tax and Trade Bureau (TTB). ''You,'' ''your,'' and similar words refer to members of the alcohol beverage industry and others to whom TTB regulations apply.

I. Background Information

Flavored malt beverages are brewery products that differ from traditional malt beverages such as beer, ale, lager, porter, stout, or malt liquor in several respects. Flavored malt beverages

exhibit little or no traditional beer or malt beverage character. Their flavor is derived primarily from added flavors rather than from malt and other materials used in fermentation. At the same time, flavored malt beverages are marketed in traditional beer-type bottles and cans and distributed to the alcohol beverage market through beer and malt beverage wholesalers, and their alcohol content is similar to other malt beverages—in the 4-6% alcohol by volume range.

Although flavored malt beverages are produced at breweries, their method of production differs significantly from the production of other malt beverages and beer. In producing flavored malt beverages, brewers brew a fermented base of beer from malt and other brewing materials. Brewers then treat this base using a variety of processes in order to remove malt beverage character from the base. For example, they remove the color, bitterness, and taste generally associated with beer, ale, porter, stout, and other malt beverages. This leaves a base product to which brewers add various flavors, which typically contain distilled spirits, to achieve the desired taste profile and alcohol level.

While the alcohol content of flavored malt beverages is similar to that of most traditional malt beverages, the alcohol in many of them is derived primarily from the distilled spirits component of the added flavors rather than from fermentation. A review of approved formulas showed that more than 99% of the alcohol in some flavored malt beverages was derived from added flavorings containing distilled spirits instead of from fermentation at the brewery.

Flavored malt beverages are sold under many proprietary names and include alcohol beverages such as alcoholic lemonades, alcoholic colas, cooler-type products, and other flavored alcohol beverages. In recent years, brewers have partnered with distilled spirits producers in order to label flavored malt beverages using prominent distilled spirits brand names.

In ATF Ruling 96–1 (ATF Quarterly Bulletin 1996–1, p. 49), our predecessor agency announced its intention to engage in rulemaking on the issue of whether it should consider the prohibition, restriction, or limitation of the use of flavor materials containing alcohol at any stage in the production of malt beverages. Pending rulemaking, the ruling held that for malt beverages with an alcohol content in excess of 6% alcohol by volume, a maximum of 1.5% alcohol by volume could be derived from alcohol flavoring materials. Six years later, in ATF Ruling 2002–2, ATF set forth guidance on the labeling and advertising of flavored malt beverages and again reiterated its intention to engage in rulemaking on the use of alcohol flavoring materials in the production of malt beverages.

In the interim, State regulatory and taxation agencies started to express concerns about the status of flavored malt beverages, and these agencies requested that ATF or TTB take action to clarify the status of these products as either malt beverages or distilled spirits.

In 2002, ATF examined the formulation of 114 alcohol beverage products labeled and marketed as flavored malt beverages. ATF undertook this study to find out how these products were produced, what ingredients were used, and from where the alcohol in them was derived. This study did not examine malt beverages labeled and marketed as flavored beers, flavored ales, and so forth (such as ''cherry beer'' or ''pumpkin ale'') since these types of malt beverages typically have the character of malt beverages and their alcohol is derived primarily from fermentation. The major results of the study are set forth in the tables below:

TABLE 1.—ALCOHOL DERIVED FROM ADDED ALCOHOL FLAVORING MATERIALS

Alcohol percentage derived from added alcohol favors	Number of flavored malt beverages
0–25%	4
26–0%	0
51–75%	≤5
76–100	105
Maximum alcohol derived from added alcohol flavors: 99.98%.	Total: 114

TABLE 2.—VOLUME OF BEER BASE PRESENT IN FLAVORED MALT BEVERAGES

Volume of flavored malt beverage derived from fermented beer base	Number of flavored malt beverages
0–25%	95
26–50%	4
51–75%	1
76–100%	14

ATF concluded that the great majority of the alcohol in most flavored malt beverages was not derived from fermentation of malt and grain. Instead, most of the alcohol in these products was derived from distilled spirits contained in added alcohol flavors. ATF found that over 75% of the alcohol in most of the flavored malt beverages studied was derived from alcohol flavoring materials and that in some cases this figure rose to more than 99%. In contrast, the alcohol derived from flavors constituted 50% or less of the overall alcohol in only 4 of the 114 products studied.

Based on the study's results, ATF also concluded that most flavored malt beverages contained very little actual beer base. Only 15 out of the 114 flavored malt beverages studied contained 51% or more by volume fermented beer; the remaining volume of those 15 products consisted of flavors, water, and other ingredients. Two of the flavored malt beverages studied contained only 1% fermented beer by volume.

II. TTB Notice No. 4

On March 24, 2003, we proposed a number of regulatory changes concerning beer and malt beverages in TTB Notice No. 4 (published in the **Federal Register** at 68 FR 14292; corrected at 68 FR 15119). Among other things, Notice No. 4 solicited comments on whether certain products marketed as flavored malt beverages should be classified as malt beverages or distilled spirits products under the Federal Alcohol Administration Act (FAA Act) and the Internal Revenue Code of 1986 (IRC). We recognized that the answer to this question would affect the rate of tax applicable to these products, the premises on which they may be produced, and the way that the products are labeled, advertised and marketed. Furthermore, their classification as malt beverages or as distilled spirits under Federal law could affect State oversight and control of these products, since many States follow the Federal classification of alcohol beverages.

Notice No. 4 included a proposal to limit the quantity of alcohol derived from added flavors or other ingredients containing alcohol to less than 0.5% alcohol by volume. The notice also requested comments on an alternative standard requiring that a malt beverage derive a minimum of 51% of its alcohol content from fermentation at the brewery, thus allowing no more than 49% of the alcohol content to be derived from added flavors containing alcohol.

As discussed below, Notice No. 4 also included proposed amendments to the regulations involving the filing of formulas, and the labeling and advertising of malt beverages.

III. Discussion of Specific Proposals in TTB Notice No. 4

A. Standard for Added Alcohol and Alcohol From Fermentation

In Notice No. 4, we proposed to delineate how much of the alcohol content of a beer or malt beverage must be derived from fermentation at the brewery, and how much of the product's alcohol content may be derived from alcohol added through the use of flavors and other ingredients containing alcohol.

Neither the IRC nor the FAA Act provides specific limits on the quantity of flavors that may be added to beer or malt beverages; nor does either statute set forth how much of the alcohol content of those products must result from fermentation at the brewery. While neither statute expressly sanctions the direct addition of distilled spirits or other alcohol to beer or malt beverages, TTB and its predecessor agencies, as set forth in ATF Rulings 96–1 and 2002–2, have historically allowed flavors, including flavors containing alcohol, to be added to these products.

In Notice No. 4, TTB suggested that the definition of ''beer'' in the IRC, which refers to beer, ale, porter, stout, and ''other similar fermented beverages,'' requires that a product derive a substantial portion of its alcohol from fermentation at a brewery since the definition does not contemplate a product that derives most of its alcohol content from distilled spirits. As the ATF study referred to above demonstrated, few products marketed as flavored malt beverages derive a substantial portion, or even a bare majority, of their alcohol content from fermentation.

We also stated that a similar standard should apply to the definition of a ''malt beverage'' under the FAA Act. The FAA Act defines a malt beverage as a product made from the fermentation of malted barley with the addition of hops. While the definition in the FAA Act allows for the addition to malt beverages of ''other wholesome food products'' such as flavors, we stated that we do not believe that Congress intended for these added materials to represent the dominant source of a product's alcohol content.

B. Proposed 0.5% Added Alcohol by Volume Standard for ''Beer'' Under the IRC

In Notice No. 4, TTB proposed adding to the regulations a new § 25.15 (27 CFR 25.15) that would have the effect of treating as a distilled spirits product any fermented product that contains 0.5% or more alcohol by volume derived from flavors, taxpaid wine, or other ingredients containing alcohol. As a consequence of the proposed new section, those products would be taxed and classified as distilled spirits. This proposed section also would allow the use of barley malt, malted grains other than barley, unmalted grains, sugars, syrups, molasses, honey, fruit, fruit juice, fruit concentrate, herbs, spices and other food materials in the production of a beer. It did not provide any standards for the use of these ingredients.

In Notice No. 4, TTB noted that this 0.5% alcohol standard had long been used to determine whether a beverage is considered an alcohol beverage. For example, many beverages, including juice, soft drinks, and soda, contain a small amount of alcohol derived from the use of flavoring materials containing distilled spirits. As long as the overall alcohol content of the product is below 0.5% alcohol by volume, these products are not considered alcohol beverages, and are not taxed as such. If the alcohol content of the a product reaches 0.5% alcohol by volume, the product would be subject to the tax imposed on distilled spirits products, since it would fall within the statutory definition of a distilled spirits product.

C. Proposed 0.5% Added Alcohol by Volume Standard for Malt Beverages Under the FAA Act

In Notice No. 4, TTB proposed adding to the regulations a new § 7.11 (27 CFR 7.11) that would classify a fermented product as a malt beverage only if it contains less than 0.5% alcohol by volume derived from flavors or other ingredients containing alcohol. This proposed section would also have explicitly permitted filtration or other processing to remove color, taste, aroma, bitterness, or other characteristics derived from fermentation. We specifically solicited comments on this proposed standard and on any other standard that might be consistent with the FAA Act definition of a malt beverage.

Notice No. 4 noted that the FAA Act's definition of ''malt beverage'' was intended to cover all products made by brewers at the time of the enactment of that Act in 1935. As already noted above, this definition requires that a malt beverage be made from the fermentation of malted barley with hops, with or without the addition of ''other wholesome food products.'' For years, brewers have used many substances, including starches, sugars, honey, fruits, flavors (including those containing alcohol), colors, and adjuncts to aid in fermentation, clarification, and preservation of malt beverages. TTB and its predecessor agencies have allowed these ingredients in malt beverage products.

TTB and its predecessor agencies have rarely examined the question of what constitutes ''wholesome food products'' under the FAA Act, other than to state that the ingredients added to malt beverages must be recognized as safe for food use by the Food and Drug Administration and must have some intended purpose in malt beverage production. We and our predecessor agencies have considered flavorings containing distilled spirits to be wholesome food products and have allowed their use in producing malt beverages.

The use of flavors containing distilled spirits can introduce a significant amount of distilled spirits into a malt beverage. Adding alcohol or distilled spirits in this fashion reduces the need to use fermented malt in the production of a malt beverage in order to attain alcohol content. When carried to extremes, this practice results in a product in which most of the alcohol content is derived from added flavors rather than from fermentation at a brewery.

Based on the above considerations, we stated in Notice No. 4 our belief that the definition of a malt beverage in the FAA Act supports limiting the amount of alcohol that is not ''made by the alcoholic fermentation * * * of malted barley with hops.'' Further, we stated our belief that labeling a beverage that derives most of its alcohol content from added alcohol flavors as a malt beverage is inherently misleading since consumers expect that malt beverages derive a significant portion of their alcohol content from fermentation of barley malt and other ingredients at the brewery.

D. Alternative 51/49 (Majority) Alcohol Standard

Although Notice No. 4 stated that both the IRC and the FAA Act would support a 0.5% added alcohol standard, it also stated that the IRC would support the issuance of a regulation requiring that a beer or malt beverage product must derive a majority of its alcohol content from fermentation at the brewery. Accordingly, TTB sought comments on both the 0.5% standard and a 51/49 standard, which would allow up to 49% of the alcohol in a beer or malt beverage to be derived from flavors or other materials containing alcohol.

E. Proposed Alcohol Content Labeling Statement for Flavored Malt Beverages

In Notice No. 4, TTB suggested that, due to the unique character of these new types of flavored malt beverages, many consumers have limited experience with them. At the same time, due to their label appearance and the use of the brand names of well-known distilled spirits products, TTB believed that consumers are likely to be confused as to the actual alcohol content of the products. TTB suggested that consumers are likely to assume that some flavored malt beverages are high in alcohol content like the distilled spirits products whose brand names they bear. Likewise, while other brands of flavored malt beverages are not labeled with distilled spirits brand names, their labeling or packaging, which often resembles that of nonalcoholic beverages such as juices, sodas, bottled water, and energy drinks, is likely to confuse consumers as to their identity as alcohol beverages.

To avoid consumer confusion over the alcohol content in flavored malt beverages, we proposed the addition of a new paragraph (a)(5) in § 7.22, (27 CFR 7.22), setting forth a mandatory requirement to state on the brand label the alcohol content of any malt beverage that contains any alcohol derived from added flavors or other ingredients containing alcohol. We suggested that this requirement would help consumers identify these products as alcohol beverages and would help consumers to understand that their alcohol content is similar to that of traditional malt beverages. This alcohol content labeling would also draw attention to any flavored malt beverages that might lie outside the customary 4 to 6% alcohol by volume range for malt beverages. For example, if a flavored malt beverage contained 10% alcohol by volume, alcohol content labeling would inform consumers about this important fact.

Since there is no provision in the TTB regulations that uniquely identifies flavored malt beverages, we proposed that the mandatory alcohol content labeling apply to any malt beverage that contains alcohol from a source other than fermentation at the brewery. For example, if a brewer adds a flavoring containing alcohol to a malt beverage, whether it is labeled as a flavored malt beverage, as a flavored beer or ale, or as a specialty malt beverage product, the requirement to display alcohol content on the brand label would apply. We proposed no changes to the form of the alcohol content statement, to the tolerances provided in 27 CFR 7.71, or to the type size requirements in 27 CFR 7.28.

F. Use of Distilled Spirits Terms in Malt Beverage Labeling and Advertising

Notice No. 4 pointed out that some newer flavored malt beverages use the names of well-known brands of distilled spirits as part of their own brand names. The labels of these flavored malt beverage brands are often designed to resemble the labels of the distilled spirits brand used in their names. In addition, when first introduced, some of these flavored malt beverages bore label statements referring to the class and type of distilled spirits used in producing the nonbeverage-flavoring component. For these reasons, a number of State regulatory and taxing authorities questioned the classification of flavored malt beverages and requested that we take action to clarify their status as either malt beverages or distilled spirits.

As previously noted, ATF Ruling 2002–2 clarified permissible labeling and advertising practices for flavored malt beverages, and gave brewers and importers labeling guidelines to prevent the misleading impression that flavored malt beverages are distilled spirits or contain distilled spirits. Notice No. 4 proposed to incorporate the holdings of the ruling in a new 27 CFR 7.29(a)(7) for labeling purposes and a new 27 CFR 7.54(a)(8) for advertising purposes. These proposed provisions would add to the malt beverage regulations language similar to that found in the FAA Act wine regulations regarding distilled spirits statements. The proposed language would prohibit labeling and advertising statements that imply that malt beverages are similar to distilled spirits or that malt beverage products are made with, or contain, distilled spirits.

The two new provisions in question would allow the use of a brand name of a distilled spirits product as the brand name of a malt beverage. However, the proposed provisions would have the effect of prohibiting the use of a distilled spirits brand name in any other malt beverage labeling or advertising context. The use of a cocktail name as a brand name or fanciful name would be permitted if the malt beverage's overall formulation, label, or advertisement did not present a misleading impression about the identity of the product.

G. Filing Formulas for Fermented Beverages

Notice No. 4 noted that the TTB regulations at 27 CFR 25.62 and 25.67 require brewers to file a statement of process with TTB's National Revenue Center in Cincinnati, Ohio, as part of the Brewer's Notice for any fermented beverage that the brewer intends to market under a name other than ''beer,'' ''lager,'' ''ale,'' ''porter,'' ''stout,'' or ''malt liquor.'' Under 27 CFR 25.76, a brewer must file an amended Brewer's Notice if there are changes to an approved statement of process. When a brewer files a statement of process with the National Revenue Center, a specialist at TTB's Advertising, Labeling and Formulation Division in Washington, DC, examines the proposed statement of process to ensure that authorized materials will be used, to determine the correct class and type, and to ensure that the fermented product may be made at a brewery.

Notice No. 4 proposed significant changes to the filing requirements described above. These changes included the removal of §§ 25.62(a)(7), 25.67 and 25.76 and the addition of new §§ 25.55 through 25.58 (27 CFR 25.55 through 25.58). These changes would:

- Replace the statement of process requirements found at §§ 25.62(a)(7) and 25.67 with a formula requirement;
- Describe more clearly the fermented products for which a formula is necessary;
- Require brewers to provide specific information about ingredients, processes, and alcohol content in formulas;
- Allow brewers to file formulas directly with the Advertising, Labeling and Formulation Division in Washington, DC;
- Permit brewers to produce certain fermented beverages solely for research and product development purposes without having to receive formula approval;
- Allow brewers to file formulas to cover production at multiple breweries; and
- Allow brewers to file superseding formulas.

Proposed § 25.55 would require the filing of a formula with TTB for specified products made at a brewery, including saké, flavored saké, and sparkling saké. A formula also would be required for products to which any coloring or natural or artificial flavors are added, or for any product to which fruits, herbs, spices or honey are added. This new section also would require the filing of a formula for any fermented product that undergoes special processing or filtration, or undergoes any other process not used in traditional brewing. The proposed § 25.55 text included examples of processes that would require the filing of a formula, including reverse osmosis, ion exchange treatments, filtration that changes the

character of beer or removes material from beer, concentration or reconstitution of beer, and freezing or superchilling of beer. However, the proposed Notice No. 4 text would not require filing a formula for traditional brewing processes such as pasteurization, filtration prior to bottling, filtration in lieu of pasteurization, centrifuging (for clarification), lagering, carbonation and the like.

Notice No. 4 also proposed more specific requirements for the information required in formulas, especially in the realm of flavoring materials and special processes. Proposed § 25.57 spelled out in more detail the information required in formulas, and included requirements found in ATF Rulings 94–3 (which concerned the production of ice beer), 96–1, and 2002–2. In keeping with the current practice of listing ranges of ingredients in statements of process, proposed § 25.57(a)(1) would permit brewers to indicate a ''reasonable range'' of ingredients used in formulas. However, in order to establish a useful limit, Notice No. 4 requested comments on how to define a ''reasonable range'' for the quantity of ingredients used in making fermented products. Also in keeping with current policy that permits using special processes in making fermented products, the proposed § 25.57 text specifically permitted such special processes, but required brewers to describe them in detail in their formulas.

As noted in Notice No. 4, § 25.67 requires brewers to file a statement of process prior to producing any fermented product at the brewery that is not to be marketed under a traditional designation. This regulation does not provide any exception permitting research or development of fermented products without a statement of process. With the removal of § 25.67, a brewer could produce certain fermented beverages for research and development purposes under proposed § 25.55(c)(2) without receiving formula approval; however, a brewer could not sell or market such products until receiving formula approval.

Proposed § 25.55(e) stated that previously approved statements of process would remain valid after adoption of the new regulation, provided that the finished product is in compliance with any new requirements relating to the definition of beer.

The proposed formula regulations did not specify any Government form to be used for their filing. TTB also solicited comments on whether the proposed regulations on the preparation and filing of formulas would be easier and less confusing than the present statement of process requirement.

H. Samples; Formulas and Samples for Imported Malt Beverages

Notice No. 4 also included a proposed new section, § 25.53 (27 CFR 25.53), specifically authorizing a TTB officer at any time to require the submission of samples. This section recognized TTB's authority to require a brewer to submit a sample of a beer or a material used in producing a beer. For example, we occasionally examine samples of beer or ingredients in connection with our review of statements of process or formulas and in order to determine the proper tax classification of fermented products.

Finally, Notice No. 4 also included a proposed amendment to § 7.31 (27 CFR 7.31) to reflect TTB's statutory authority to require an importer to submit a formula for a malt beverage, or a sample of a malt beverage or materials used in producing a malt beverage, in connection with the filing of a certificate of label approval on TTB Form 5100.31. This proposal recognized the fact that, occasionally, TTB has had to examine a statement of process or analyze samples of a malt beverage in order to determine the proper classification of a product, whether a particular product is a malt beverage, or whether a product is correctly labeled under the part 7 regulations.

I. Other Issues Raised in Notice No. 4

In addition to the very specific proposals made by Notice No. 4, TTB requested comments and information on a number of general topics relating to the production and labeling of flavored malt beverages.

TTB requested comments on the proposed 0.5% added alcohol standard for beer. Specifically, we solicited information regarding any studies, laboratory trials, or other empirical data that may have existed for added alcohol in flavored malt beverages. We also sought comments on how adoption of the proposed standard would affect the taste, shelf life, stability, or other characteristics of flavored malt beverages. In addition, we sought comments on whether production practices are available to produce flavored malt beverages with the desired product profile that would comply with the proposed standard. We also solicited comments relating to the effect of the proposed regulation on the viability of products currently on the market. Notice No. 4 further stated that we were particularly interested in comments addressing whether products on the market could be made under the proposed 0.5% added alcohol standard.

Finally, as previously noted, TTB requested comments on whether another standard, such as a standard requiring that a minimum of 51% of the alcohol in a malt beverage be derived from fermentation at the brewery (in other words, setting a maximum limit of 49% for the alcohol content derived from added flavors or other materials), would be more appropriate than the proposed 0.5% added alcohol standard. We asked for supporting data, facts, or studies to back up any suggestions or comments for different added alcohol standards. Since we recognized that any new standard would constitute a substantial change from existing regulations and policy, we also sought comments on the amount of time needed to comply with any new rule limiting the amount of alcohol that may be added to products taxed as beer. Notice No. 4 encouraged comments on the amount of time necessary to develop and implement new formulas for these products and the possible costs involved.

IV. Rulemaking History

Notice No. 4 provided for the submission of comments through June 23, 2003. At the request of the E. & J. Gallo Winery, on June 2, 2003, we published Notice No. 10 (68 FR 32698) to extend the period for the submission of comments for an additional 120 days, until October 21, 2003.

In Notice No. 4 we stated our intention to place all comments on the TTB Web site on the Internet. We stated that the names of commenters would be included in the posting of comments on our Web site, but that street addresses, telephone numbers, or e-mail addresses would be deleted on these postings. We did state that this information would appear on copies of comments available in the TTB reference library in Washington, DC.

Due to the large number of comments, we were unable to redact street address, telephone number, or e-mail address information from the comments we posted on our Web site. Redacting this information from the large number of comments received would have prevented us from posting comments on the Web site in a timely manner. Therefore, we issued TTB Notice No. 23 on December 2, 2003 (68 FR 67388). This notice advised the public of our inability to redact the information from comments posted on the Web site and provided an opportunity for commenters to request that we redact this information from their individual

comments if we received their request to do so by December 23, 2003.

V. Comments Received in Response to Notice No. 4

A. General Discussion of Comments

Before the close of the comment period, TTB received over 15,000 comments in response to Notice No. 4. Of these, over 14,000 consisted of variations on several form letters, which were submitted by mail, facsimile transmission, or e-mail.

In addition, we received over 1,000 comments after the close of the comment period. Due to the large volume of comments received in response to Notice No. 4, and because of the need to provide expeditious guidance to State regulatory agencies, the industry, and consumers on this issue, we determined that it was not practical to consider the late-filed comments.

Most of the comments focused on the proposed 0.5% standard or the 51/49 standard for beer and malt beverages. In particular, the ''form letter'' comments, which made up the vast majority of the comments, generally commented for or against the proposed rule, and either explicitly or implicitly commented on the standard for added alcohol. The hundreds of comments received from State legislators also focused primarily on this issue. While Notice No. 4 solicited comments on whether there was a different standard that would be appropriate, only a few comments addressed this question.

Furthermore, only a small percentage of the total comments focused on issues such as alcohol content statements or formula requirements. Accordingly, the following breakdown of comments focuses on the commenters' position on the proposed 0.5% standard.

B. Overview of Comments

In the following comment discussion, the abbreviations ''FMB'' and FMBs'' are used in place of ''flavored malt beverage(s).''

1. Form Letters

Of the over 14,000 form letter submissions referred to above, over 8,000 supported adoption of the proposed 0.5 percent standard and over 5,000 opposed adoption of that standard. The submissions in support of the proposed rule (or specifically in support of the 0.5 percent standard) break down as follows:

- Over 5,000 e-mail comments came from individuals who identified themselves as employees of one major U.S. brewer and its subsidiaries. These commenters stated that the proposed standard is the best way to maintain clear distinctions between beer and liquor (distilled spirits) and to preserve the flavored malt beverage category.
- Over 2,000 comments were received from beer distributors across the United States. Many of these commenters stated that the proposed rule is consistent with the historical interpretation of what constitutes beer and other malt beverages. They suggested that beer is a unique product that has been regulated and taxed differently from other alcohol beverages throughout our Nation's history. The commenters advocated adopting the proposed 0.5% standard in order to ensure the integrity of beer and the brewing process. They also stated that the proposed rule would help maintain an orderly marketplace and avoid costly and confusing disruptions in State licensing, taxation, and distribution policies, any of which would deal a blow to beer wholesalers.
- Approximately 900 comments were received from individuals who identified themselves as employees of another major brewer. These comments supported the proposed rule as a clarification that will ensure that if FMBs were sold as malt beverages, they would be made according to traditional brewing methods and practices. The commenters suggested that without the proposed rule, retailers and wholesalers would face a patchwork of individual State laws and regulations.
- Over 170 submissions came from beer consumers located primarily in two States. Many of these commenters stated that the proposed rule would provide a clear understanding to legislators, State and Federal regulators, and beer consumers as to what beer is and what beer is not.
- More than 50 employees of a domestic subsidiary of a foreign brewer expressed their support for the proposed rule. They suggested that the proposed rule would maintain an orderly marketplace, meet consumer expectations for consistent products, and help sustain the long-term development of the product category. These commenters suggested that the reformulated products would be consistent with State tax, license, and distribution laws, allowing wholesalers and retailers to continue their operations. Furthermore, they stated that without a standard, individual States would adopt their own regulations and create a patchwork of different standards.

The submissions in opposition to the 0.5 percent standard break down as follows:

- Over 4,000 e-mail submissions came from consumers of FMBs. These comments opposed the proposed rule and suggested that there was no need to amend the regulations. Many of the commenters stated that they like FMBs just the way they are and that the proposed changes will be expensive and will result in increased costs to consumers.
- Over 600 comments came from employees of a large producer of FMBs. These commenters opposed the proposed rule and suggested TTB instead adopt the ''51% compromise.'' The commenters suggested that compliance with the proposed standard would cost millions of dollars in new equipment purchases, reformulation of products, and development of new processes. They urged TTB to adopt regulations that promote fair competition and provide a level playing field, and they suggested the proposed rule would mark a dramatic change in how these products have been produced, marketed, and sold for 30 years. Finally, the commenters stated that the proposed rule could regulate FMBs out of the marketplace, depriving consumers of a drink they enjoy, costing millions in tax revenue, and resulting in the loss of thousands of jobs.
- Over 400 small retailers located across the United States expressed their opposition to the ''new regulations'' and ''rule changes.'' Many of these retailers asked TTB to reach a ''compromise'' that would allow FMBs to remain in existence. The commenters suggested that the regulatory changes would raise the price of FMBs, sabotage this category of products by making it impossible or costly to sell them, and adversely impact small businesses.
- More than 40 comments were received from employees of FMB distributors. These commenters opposed the 0.5 percent standard and urged TTB to adopt a ''more reasonable'' majority standard instead. The commenters focused on the potential impact of the proposed rule on the future of FMB producers and the businesses that rely on the viability of these products.

2. Other Comments

FMB Producers. We received comments from several major producers of FMBs. The Beer Institute submitted a comment in support of the proposed 0.5% standard, on behalf of Anheuser-Busch, Miller Brewing Company (''Miller''), and Coors Brewing Company (''Coors''). The Beer Institute stated that these three senior and sustaining members produce or import well over 75% of the beer and other malt beverages sold in the United States,

including many successful FMB brands. In addition, these three brewers each submitted individual comments in support of the proposed 0.5% standard.

These commenters argued that the proposed 0.5% standard is consistent with TTB's statutory authority and will preserve the integrity of the products known as beer or as malt beverages. More importantly, these commenters suggested that only a 0.5% standard would maintain an orderly marketplace and foreclose actions by individual States, which could adopt their own potentially differing and conflicting standards. Anheuser-Busch and Miller stated that they could take steps to reformulate their products within the 0.5% standard and, in fact, have produced FMBs that achieve the same taste and appearance as existing products.

The Flavored Malt Beverage Coalition (FMBC) submitted a comment on behalf of its members: City Brewing Company; Diageo North America, Inc.; High Falls Brewing Company; Mark Anthony Brands, Inc.; Pernod Ricard USA; Todhunter International; and United States Beverage LLC. The FMBC stated that, together, its members marketed and/or produced approximately 56% of the FMBs sold in the United States in 2002. The FMBC also stated that its members, as companies that collectively spent hundreds of millions of dollars to develop products now threatened by a change in Federal policy, have a particular interest in the outcome of the rulemaking.

The FMBC, and several of its individual members, questioned TTB's statutory authority to impose restrictions on the current practice but also stated that, as a matter of policy, they would support a final rule that adopts the 51/49 standard. Furthermore, these commenters raised a number of legal challenges to the basis for the proposed rule, and they argued that the proposed 0.5% standard was not supported by either the consumer protection rationale or the need to take action before the States do so.

Several of these commenters stressed the economic impact of the proposed rule. Many FMB producers suggested that the proposed 0.5% standard would require reformulation of popular FMB products, with a potentially adverse impact on consumer acceptance of those products. The FMBC submitted an economic study indicating that adoption of the proposed rule would have an adverse impact on the FMB industry, amounting to over $600 million over the next 4 years. Comments from a few small brewers that produce and bottle FMB products indicated that their survival would be in jeopardy under the proposed rule.

Brown-Forman Corporation (''Brown-Forman''), the producer of an FMB known as Jack Daniel's Country Cocktails, also commented in favor of the 51/49 standard. Finally, E. & J. Gallo Winery (Gallo), which produces 13 FMB products, submitted a comment in which it took no position on whether it preferred the 0.5% standard or the 51/49 standard.

Other Comments from the Beer Industry. The National Beer Wholesalers Association (NBWA) and the Brewer's Association of America (BAA) both commented in favor of the proposed 0.5% standard. TTB also received many comments from craft brewers, beer wholesalers, employees of the major brewers, and others in the beer industry supporting the proposed rule. Many of these comments suggested that FMBs are not beer or malt beverages as consumers understand these terms and that the proposed rule would preserve the integrity of the malt beverage category. Some brewers suggested that competition from FMB producers is hurting the beer industry.

Consumer/Taxpayer Groups. The Center for Science in the Public Interest (CSPI), the Pacific Institute for Research and Evaluation, and several other associations commented in favor of the proposed rule. CSPI stated that the use of popular, well-known distilled spirits brand names in the advertising and labeling of malt beverage products misleads consumers. CSPI also suggested that these ''alcopops'' are extremely popular with underage drinkers, and that since most ''alcopop'' products currently do not comply with the 0.5% standard, classifying and taxing them as distilled spirits products would help reduce youth access to such products by placing them in liquor stores in many States rather than in grocery and convenience stores.

The National Consumers League (NCL) commented against the 0.5% standard, stating that it opposed the perpetuation of policies that differentiate malt-based alcohol beverages from distilled alcohol beverages, and suggesting that ethyl alcohol is the same, regardless of whether it is in beer, wine, or distilled spirits. NCL agreed, however, that requiring compliance with a ''majority'' standard will ensure that an FMB actually contains malt, and in a significant concentration. While NCL questioned whether source of alcohol is in any way material to consumer choice, it concluded that FMB compliance with the majority rule would ensure that consumers are not deceived as to product content.

TTB also received comments opposing the proposed rule from taxpayer and citizen organizations. These commenters suggested that the proposed rule would limit consumer choice, decrease competition, and waste taxpayer dollars. The commenters stated that the Government should accommodate legitimate consumer, industry, and employment needs. They suggested that the majority standard would achieve these goals better than the proposed 0.5% standard.

State Regulatory Agencies and Lawmakers. TTB received comments from 31 State regulatory or tax agencies and one county liquor commission. Most of these comments specifically supported the proposed rule. The remaining comments generally supported the concept of a uniform standard for FMBs, without specifically supporting the proposed 0.5% standard. Two States simply provided information about their State laws, without taking a position on the standard. We also received comments in support of the proposed rule from three Governors, one Lieutenant Governor, and over 200 State legislators. A smaller number of State legislators commented in favor of the 51/49 standard.

Some comments that specifically favored the proposed rule suggested that, in many States, malt beverages containing distilled spirits would be classified as spirits rather than malt beverages. Several States indicated that if TTB does not take expeditious action on this issue, they would go ahead and issue their own standards. Other States, however, simply stressed the need for a uniform standard and urged TTB to take expeditious action to create a standard for FMBs.

Members of Congress. We received comments in favor of the proposed rule from nine members of the United States House of Representatives. We received comments in favor of the 51/49 (or majority) standard from 28 members of the House of Representatives and eight United States Senators.

Many of the members of Congress who commented in favor of the 51/49 standard expressed concern about the negative economic impact that the proposed rule would have on employers and jobs within their districts or States. Many of these comments noted that existing FMB products were formulated in reliance on the longstanding policies of our predecessor agency.

Miscellaneous comments. We received a comment from the Flavor and Extract Manufacturers Association of the U.S. (FEMA), the national trade

association of companies that create and manufacture flavors for use in a wide variety of products, including FMBs. FEMA urged TTB to reconsider the proposed 0.5% standard, stating that it would significantly restrict the amount of alcohol contributed to the finished product from flavors and thus make it technically impossible for flavor chemists to satisfy the consumer desire for the distinctive, fresh, fruity malt beverages currently being sold.

We received a few comments suggesting revisions to the system of taxing alcohol beverages as a way to take care of the classification issue posed by FMBs. These comments could not be adopted without legislative amendments to the IRC. Since the rest of the comments focused primarily on the two standards that we aired in Notice No. 4, the 0.5% standard and the 51/49 standard, our discussion of the comments will focus on those two standards.

A small number of commenters focused on the remaining issues raised for comment in Notice 4. While we received several comments from States and consumer groups in support of the proposed mandatory alcohol content labeling for FMBs, many comments from industry members suggested that FMBs were being unfairly singled out, and that any such requirement should apply to all malt beverages or to none. We also received a few comments in opposition to the proposed limitations on the use of distilled spirits terms in malt beverage labeling and advertising. Some of these commenters claimed that the proposed restrictions violated the First Amendment.

Finally, we received a small number of comments from brewers and brewery trade associations regarding the proposed new formula filing requirements. These commenters generally favored the new requirements, but they expressed concerns regarding certain aspects of the proposal and requested that TTB clarify some of the proposed formula requirements.

C. Summary of TTB Final Rule Decisions

After carefully analyzing the comments, which are discussed in greater detail below, we are adopting the proposals set forth in Notice No. 4 with certain important modifications. The final rule adopts the less stringent ''51/49 standard'' (allowing up to 49% of the alcohol content to come from flavors and other nonbeverage ingredients) for beers and malt beverages. We are providing affected industry members one year to reformulate their FMB products or otherwise conform to the standards adopted in the final rule. In reaching these decisions, we note that Executive Order 12866 provides that, when an agency determines that a regulation is the best available method of achieving an objective, it shall design its regulation in the most cost-effective manner to achieve that objective.

The comments on Notice No. 4 have persuaded us that implementation of the proposed 0.5% standard might impose economic burdens on a sector of the FMB industry and have adverse effects on the viability of small brewers who produce FMBs, as well as their ability to compete within the malt beverage industry.

We believe that adoption of the alternative ''51/49 standard'' for beers and malt beverages would achieve the important regulatory goals of protecting the revenue, ensuring that consumers have adequate information about the identity of FMB products, and establishing a Federal standard for such products, while at the same time reducing the compliance costs to the FMB industry. It is noteworthy that, with the exception of one producer that remained neutral on this issue, comments from the producers of FMBs all supported either the more restrictive 0.5% standard or the more liberal 51/49 standard. Thus, most of the FMB industry expressed support for creating some type of standard for FMBs that would set a limit on the alcohol derived from added flavors.

The final rule also adopts the other proposals aired in Notice 4, with certain modifications in response to the comments. We are adopting the proposed mandatory alcohol content labeling requirements, as we have concluded that this requirement will provide consumers important information about these FMBs. Since we specifically stated in Notice No. 4 that we were not proposing mandatory alcohol content labeling for all malt beverage products, comments advocating such a position were considered to be outside the scope of the current rulemaking. We may consider such a proposal in the future.

We are also adopting the labeling and advertising proposals, with modifications to respond to the First Amendment concerns raised by several commenters. As modified, the regulation will prohibit the use of labeling or advertising statements, designs, devices, or representations that tend to create a false or misleading impression that the malt beverage contains distilled spirits or is a distilled spirits product. These modifications clarify that we are only prohibiting labeling and advertising statements that are false or tend to mislead consumers.

Finally, we have modified the language of the formula regulations in response to several comments about whether the proposed requirements were overly burdensome. For example, we are no longer requiring formulas to disclose the alcohol content of the product at each interim stage of production. We have also clarified the language of these provisions in response to several technical comments.

VI. Comments on Whether the Rulemaking Is Necessary and Fair

In this section, we discuss some of the general issues raised by commenters regarding the need for engaging in rulemaking and the fairness of the proposed change in agency policy.

A. Is There a Need To Engage in Rulemaking on This Issue?

The first issue presented is whether there is a need to engage in rulemaking at all. Many commenters suggested that TTB should not amend its regulations in any manner, but should instead allow the continued production of FMBs according to current policy. Other commenters supported the idea of rulemaking on FMBs.

1. Comments Opposed to Rulemaking

As indicated above in the comment overview, TTB received over 4,000 e-mail comments that questioned the need for rulemaking on FMBs. These comments came from consumers who stated that they enjoyed drinking FMBs, and that they opposed the proposed regulation, which would mandate changes in the way those products were made. The commenters stated that they liked FMBs the way they are, that the changes would be expensive, and that consumers will end up paying more under the proposed rule.

Many of these commenters suggested that the Federal Government should not waste tax dollars on ''trivial'' issues such as how FMBs are made, and that companies should make changes that consumers want, not what the Government demands. Finally, many of these comments suggested that the Government should focus on bigger issues, such as job creation, improving the economy, and fighting terrorism. These comments did not directly address the 51/49 standard.

A few comments were also received from organizations representing taxpayer and citizen groups, including Americans for Tax Reform, the National Taxpayers Union, and Citizens Against Government Waste. One of these commenters stated that the proposed

rule would limit consumer choice, decrease competition, and waste taxpayer dollars. This commenter suggested that the Government should accommodate legitimate consumer, industry, and employment needs before engaging in rulemaking. Another commenter expressed concerns that the 0.5% standard would force either a significant tax increase and/or a change in the production process for FMBs. It should be noted that while these comments generally criticized the proposed rule, they expressed a preference for either the 51/49 standard or some compromise over the 0.5% standard.

2. Comments Supporting Rulemaking

TTB also received approximately 11,000 comments urging that TTB set a limit on the quantity of alcohol derived from added flavors in malt beverages. While these comments were divided over whether the limit should be set at the 51/49 standard or the proposed 0.5% standard, these commenters believed that it was important that TTB set a standard and clarify the classification of these products as malt beverages or distilled spirits. It should be noted that we received comments in support of setting a standard from the beer industry, producers of flavored malt beverages, consumers, members of Congress and other elected officials, and State regulatory agencies.

These commenters supported the setting of a uniform Federal standard for a variety of reasons. Some commenters expressed concern that current labels mislead consumers. Many consumers and brewers suggested that the Federal government has the responsibility to maintain a distinction between traditional beer products and distilled spirits, and that the line between these two well-established categories should not be blurred by allowing the production of malt beverages that derive most of their alcohol content from the distilled spirits components of added flavors.

Many commenters expressed concern that, in the absence of a Federal standard, the States would each set their own standards, leaving members of the beer industry facing a confusing patchwork of regulatory standards. Finally, of the FMB producers who commented on this issue, almost all supported action to set a standard to limit the quantity of alcohol derived from added flavors. While one major FMB producer expressed neutrality on the issue, the rest favored either the proposed 0.5% standard or the 51/49 standard.

3. TTB Response

We acknowledge that FMBs are a popular category of alcohol beverage and that many consumers enjoy drinking these products. We recognize the concerns of many consumers that proposed regulatory changes may increase the cost of these beverages, and we have given serious consideration to cost issues in drafting this final rule. We have also given serious consideration to the issues of decreased competition and consumer choice.

Nonetheless, after reviewing the thousands of comments received in response to this notice, we believe more strongly than ever that rulemaking on this issue is necessary. The overwhelming majority of the State regulatory agencies that commented on FMBs urged TTB to adopt a Federal standard for these products in order to avoid a patchwork of inconsistent State requirements. In addition, comments from the beer industry overwhelmingly favored the adoption of a Federal standard, including many commenters who pointed to the importance of maintaining a distinction between malt beverages, in which alcohol is derived from fermentation, and distilled spirits, in which alcohol is derived from distillation.

Treasury and TTB believe it is important, in order to protect both the revenue and the consumer, to set a limit on the use in FMBs of alcohol not derived from fermentation at the brewery and prevent the unlimited use of alcohol derived from distilled spirits in FMB production. Thus, we do not adopt the views of those commenters who urged that TTB take no action on this matter.

B. Fairness and Notice Issues

1. Comments Received

Many commenters argued that it is unfair for TTB to change a policy upon which brewers and importers have relied for several decades. These commenters made the following arguments:

- Since the 1950s, TTB and its predecessor agencies have required the review and approval of a statement of process (SOP) for any beer produced with flavors. By reviewing and approving SOPs for the various FMBs on the market today, TTB has accepted them as beer and malt beverages, and has endorsed the use of nonbeverage flavors up to the quantities indicated in the SOPs.
- Our predecessor agencies have officially recognized the use of flavoring materials in the production of malt beverages since the Internal Revenue Service issued Revenue Procedure 71–26 over 30 years ago.
- In 1980, ATF issued Industry Circular 80–3, which advised brewers that adjunct materials listed in the beer industry's Adjunct Report (later referred to as the Adjunct Reference Manual (ARM)), were suitable for use in beer and cereal beverages when used in accordance with the conditions described in the report. That Adjunct Report, as well as all subsequent editions of the ARM, lists ethyl alcohol as a permitted additive for use in flavoring beer, without any limitations.

Several commenters stated that they have relied on these policies to create beverages that consumers enjoy and that they have invested millions of dollars promoting those brands.

Some commenters argued that the industry had ample warning that TTB's predecessor agency was contemplating a limitation on the use of flavors containing alcohol in the production of beer and malt beverages. These commenters noted that in 1996 ATF notified the industry, through ATF Ruling 96–1, that rulemaking limiting the alcohol contribution from flavors in FMBs under 6% alc/vol was forthcoming. This ruling clearly stated that TTB would initiate future rulemaking to consider the prohibition, restriction, or limitation on alcohol derived from the distilled spirits components of added flavors, a statement that was reiterated in ATF Ruling 2002–2.

However, commenters who opposed the proposed 0.5% standard suggested that ATF's actions after 1996 sent mixed signals to the industry. For example, a U.S. Senator stated that although the Bureau in 1996 suggested that rulemaking ''in the near future'' might limit the use of flavors in such products, it abandoned that rulemaking project and did not even mention it in the unified regulatory agenda that every Federal agency must publish on a semi-annual basis. Another U.S. Senator noted that although the 1996 ruling mentioned rulemaking, no such rulemaking proposal appeared until 2003. The Senator suggested that:

> In the intervening 7-year time period, manufacturers have relied on the existing law and the Bureau's formula approvals to invest hundreds of millions of dollars in the formulation and marketing of new products. These investments have created hundreds of jobs and a vibrant fast-growing U.S. market sector in which tens of millions of cases of FMBs have already been sold. Without a reasonable public health or safety rationale, it does not seem prudent or fair to revise these rules dramatically at this stage of the game.

Accordingly, the Senator urged TTB to adopt the 51/49 standard, as it would ''accomplish the same goals and have a lesser impact on these products and the industry that produces them.''

Other members of Congress made similar comments. A letter signed by 26 members of the House of Representatives supported the ''majority'' standard, stating that over the past 5 years, ''hundreds of millions of dollars have been invested in the development of the FMB category. These investments, and the thousands of jobs created, were all made on the reliance of long-standing federal policy and rules.'' The letter suggested that Notice No. 4 intends to ''change the established rules mid-stream on those who have successfully created the category. This is especially troubling in that it threatens to stifle the only growth sector in the brewing industry over the last several years.''

Diageo stated that, in the summer of 2000, company officials met with ATF representatives and revealed Diageo's plans to enter the FMB market in the near future in reliance on existing policy. Diageo stated that company officials advised ATF that it would reconsider these plans if ATF planned to place new limits on the use of flavors in FMBs containing not more than 6% alc/vol. Diageo also stated that, after the meeting, ATF officials indicated that the agency did not plan to change existing policy towards FMB formulation. Diageo claims that, in reliance on those assurances, Diageo introduced Smirnoff Ice in December 2000.

The FMBC also stated that a number of its members had received assurances from ATF, in the summer of 2000, that ATF planned no change in policy towards the addition of alcohol to FMBs containing 6% alcohol by volume or less. The FMBC stated that it sought these assurances after an ATF official sent a letter indicating that the Bureau was considering rulemaking, which might limit the alcohol from added flavors to no more than 25% of the total alcohol content of the product.

A commenter pointed out that although ATF Ruling 96–1 stated that ATF would undertake rulemaking to limit alcohol from flavors in beer and malt beverages, ATF labeling and formula specialists never qualified approvals of statements of process or labels by stating that the approval was conditioned on future rulemaking. Instead, these commenters claimed that ATF continued to approve statements of process and labels without qualification. Another commenter stated that ATF personnel did not immediately implement the provisions in ATF Ruling 96–1 that require explicit ingredient listing and alcohol content information in statements of process, but instead delayed enforcement of these provisions until the issuance of ATF Ruling 2002–2 in 2002.

2. TTB Response

TTB agrees with the commenters who note that for many years ATF and its predecessors allowed brewers to use alcohol-flavoring ingredients, without limitation, when producing malt beverages. Our predecessor agencies approved statements of process and certificates of label approval for these products and, before 1996, never suggested that there was any limit on the use of flavoring materials in FMBs. Accordingly, we acknowledge that the FMB industry relied on existing policies in formulating these products.

It is important to note, however, that we know of no evidence that would suggest that producers of FMBs in the 1970s or 1980s were using nonbeverage flavors in their products at the high levels disclosed in the 2002 ATF study. To the best of our knowledge, the production of FMBs that derived the majority (and in some cases, up to 99%) of their alcohol content from added flavors is a trend that began in the 1990s. As the trend accelerated, ATF concluded that it was necessary to reevaluate the prior policy and consider the need for placing limits on the quantity of alcohol derived from added flavors. Furthermore, many State regulatory agencies began requesting that ATF create a Federal standard for the production of FMBs because of the confusion caused by the marketing and labeling of these products.

Agencies may change policies, as long as the agency follows the appropriate procedures under the Administrative Procedure Act. The Supreme Court has recognized that ''[r]egulatory agencies do not establish rules of conduct to last forever.'' (*See American Trucking Assns., Inc.* v. *Atchison, T. & S. F. R. Co.,* 387 U.S. 397, 416 (1967).) The Court has also stated that agencies must be given ample latitude to ''adapt their rules and policies to the demands of changing circumstances.'' (*See Permian Basin Area Rate Cases,* 390 U.S. 747, 784 (1968).) Furthermore, the Court has recognized that ''[a]n agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis * * *.'' (*See Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 57 (1983), *quoting Greater Boston Television Corp.* v. *FCC,* 143 U. S. App. D. C. 383, 394, 444 F.2d 841, 852 (1970) (footnote omitted), *cert. denied,* 403 U.S. 923 (1971).)

New manufacturing processes and marketing trends created a need for TTB and our predecessor agency to reevaluate longstanding policies on the use of flavors containing alcohol in the production of beer and malt beverages. As the above-cited cases demonstrate, an agency may make changes in policy, as long as the interpretation of the applicable statutes and the rest of the administrative record reflects reasoned deliberation.

Finally, even if the agency in the two rulings referred to by the commenter had not given notice of its intention to engage in rulemaking on this issue, and even if the agency sent mixed signals on this issue prior to 2002, an agency is not precluded from engaging in rulemaking simply because it would change even a longstanding policy. By publishing a notice of proposed rulemaking and soliciting comments on this issue, we have clearly met the notice and comment requirements of the Administrative Procedure Act (APA). Notice No. 4 provided specific notice of the proposed changes to the industry and the public, and we provided the industry and the public almost 7 months to submit comments on those proposed changes.

As reflected in this discussion of comments, we have carefully considered the comments from all interested parties, and we have given full consideration to options that would minimize any adverse economic impact flowing from the rule and that would afford industry members an adequate period of time to reformulate their products, if necessary. In crafting a standard on the use of flavors containing alcohol in the production of FMBs, we have also taken into consideration past and current agency policy. Accordingly, we have taken fairness and equity into consideration in drafting the final rule.

VII. Regulatory Burden and Cost-Related Issues

One of the most important issues raised in the comments is the difference in regulatory burdens and costs associated with the proposed 0.5% standard and the 51/49 standard. Opponents of the proposed 0.5% standard gave more weight to this issue than did supporters of that standard. However, many commenters who would be directly impacted by the proposed 0.5% standard urged TTB to adopt the 51/49 standard instead because it would be less costly and because it would not distort competition in the FMB market.

The major issues raised by commenters on both sides of this question are summarized below.

A. Costs of Complying With the Proposed 0.5% Standard

1. Comments in Support of the 0.5% Standard

Many industry members who commented in support of the 0.5% standard downplayed the importance of economic issues. For example, the Beer Institute stated that the economic well being of certain sectors of the economy should not be a consideration in straightforward application of properly enacted Federal statutes. It also suggested that some of the comments were based on erroneous information that was provided to retailers, notably the false threat that FMBs will disappear from the marketplace if the proposed TTB standard is finally adopted. Instead, the Beer Institute suggested that these products would continue either as distilled spirits products or as reformulated FMBs.

Some individual FMB producers also suggested that the economic issues were not significant. Anheuser-Busch acknowledged that, as with any new process, there may be associated transition costs, and it stated that even the 51/49 standard would require process changes and associated transition costs for most producers. Anheuser-Busch commented that it expected the total cost impact across the company's system to be minimal, ranging between a small investment in capital and a net cost savings due to process and material changes. In either case, the brewer did not anticipate that the slight change in cost would impact FMB prices for its wholesalers, retailers or consumers.

Miller commented that there are costs that have been, and will be, incurred as a result of the proposed new standard; however, it accepted those costs as a part of doing business in a regulated industry. Neither brewer submitted an estimate of the costs they expected to incur; nor did they explain precisely how they would reformulate their products to minimize the cost of compliance.

Some supporters of the 0.5 percent standard commented that the standard would not adversely affect wholesalers or retailers, and that in fact, the standard will bring clarity to the marketplace and preserve the FMB category for wholesalers and retailers. Without a clear standard, these commenters believe that the States would take action and may ultimately classify these products as distilled spirits. Such reclassification would negatively affect wholesalers and retailers because in certain States they would no longer be able to sell these products.

2. Comments Opposed to the 0.5% Standard

Opponents of the proposed 0.5% standard submitted a great deal of data about the estimated economic impact of the proposed rule. The FMBC submitted an economic study indicating that adoption of the proposed rule would have an adverse impact on the FMB industry amounting to over $600 million over the next 4 years. Other commenters argued that the proposed 0.5% standard would have negative cost implications for the industry, the public, and the Federal Government, as set forth below.

Consumer Prices. Many commenters expressed concerns that the cost of FMB products would rise if the proposed rule were adopted. As previously noted, several thousand consumers commented against the proposed rule on various grounds, including the concern expressed by many that the 0.5% standard would result in higher prices for consumers.

Disruption to Existing Businesses. The FMBC commented that the proposed 0.5% standard would profoundly threaten the FMB business of its members. It stated that these companies had relied on longstanding Federal policies to create beverages that consumers enjoy and had invested millions of dollars in promoting these brands. The FMBC suggested that any change would disrupt and possibly damage the business of its members; however, they were willing to adjust to a majority standard. The FMBC argued that the proposed 0.5% standard presented a much more dire threat to the business investment of its members, without a sound policy justification behind it.

Research and Development Costs. Many commenters suggested that compliance with a new standard would force brewers to incur extensive upfront manufacturing costs for research and development to create new formulations for existing products. According to these commenters, the 0.5 percent standard would require most manufacturers to reformulate their existing products. They stated that reformulation would be quite costly in that it would require large amounts of capital to purchase new equipment, investment in expensive technologies and treatment processes, and to advertise the newly reformulated products.

Loss of Sales Due To Reformulation. Several FMB producers commented that even if they can reformulate their products to comply with the 0.5 percent standard, they believe they may not be able to achieve the same taste profile as their existing products. They indicate that this would cause them to lose customers, thereby reducing their sales and revenue.

ECS Study. The FMBC contracted with Economic Consulting Services, LLC (ECS) to conduct an economic assessment of the impact that both the 0.5 percent standard and the majority standard would have on the domestic industry. The ECS assessment relied on information available to the public as well as information it obtained by surveying the FMBC's members. Sales by the members of the FMBC comprise approximately 56 percent of the FMB market.

The ECS found that, for various reasons, the FMBC's members unanimously responded that they would choose to reformulate their products to comply with either standard rather than sell them as distilled spirits specialty products. They expected substantial costs associated with reformulating current products to comply with either standard. ECS estimated losses based on expected loss in volume, expected upfront capital costs, expected upfront research and development and test marketing costs, expected losses in operating income, and expected capital losses. ECS then extrapolated the data they obtained from FMBC members to the entire FMB industry based on market share data.

Specifically, the ECS estimated the cost to comply over the next four years to be:

COSTS TO COMPLY (IN MILLIONS) OVER 4 YEARS

Costs to	Majority standard	0.5% Standard
FMBC Members	186.2	340.5
Entire FMB Industry ..	332.5	608.1
Federal Taxes Foregone	139.1	291.8

ECS indicated that the 0.5 percent standard imposes significantly higher costs because it ''would drive several of the products off retailer shelves completely, denying the producers, distributors and retailers a source of business and profits and denying customers a product they have come to enjoy.''

Indirect Costs. Several commenters focused on the indirect costs associated with the proposed rule. For example,

some commenters suggested that Federal Government's revenue collections would suffer because the 0.5% standard would cause sales of FMB products to decline. Several FMB wholesale distributors and other commenters expressed concern that the 0.5 percent standard would cause existing FMBs to be reclassified as distilled spirits, with the result that wholesale distributors would no longer be permitted to distribute them in certain States. These commenters also noted that this reclassification would affect retailers because, in many States, only State stores can sell distilled spirits.

Effect on Small Businesses. Many commenters suggested that the proposed 0.5% standard would have adverse effects on small businesses. Some of these commenters suggested that the costs of complying with any new standard would hurt small companies the most since larger companies possess economy of scale advantages.

TTB received a few comments from companies that identified themselves as small brewers that would be adversely impacted by the proposed rule. It should be noted that, pursuant to the regulations issued by the Small Business Administration, a small brewer is one that has no more than 500 employees. (*See* 13 CFR 121.201). These commenters urged TTB to adopt the 51/49 standard. They suggested that the proposed rule would have a disproportionately large impact on small businesses because they are less able to adapt to the new technology necessary to comply with the proposed 0.5% standard.

Mark Anthony Brands (MAB), a member of the FMBC, is the national distributor and marketer of several popular FMB products. MAB and its production affiliate, Mark Anthony Brewing, Inc., contract with four U.S. co-packing facilities to produce its FMB products. [In this document, references to ''co-packing'' cover situations where one brewer produces and bottles for another brewer pursuant to a contract or where a brewer uses another brewer's premises under an alternating proprietor arrangement.] MAB suggested that TTB should abandon the 0.5% proposal in favor of the majority standard because the latter did not threaten the competitive viability of small companies like MAB and its co-packers. MAB suggested that the 0.5% standard would threaten the viability of the few regional breweries that currently co-pack FMB products for MAB and others.

City Brewing Company stated that it owns and operates a 5-million barrel capacity brewery in La Crosse, Wisconsin, which employs 350 people. The brewery was closed in 1999, but resumed operations in 2000 capitalized with funds contributed by employees and local investors. It adopted a contract-brewing business strategy because the beer brands formerly produced by the brewery were purchased and are now controlled by a major brewery. City Brewing Company stated that the consolidation of U.S. breweries had virtually eliminated all excess brewing capacity for beer marketers other than the largest U.S. brewers. The brewery stated that it has been profitable since resuming operation, but it expressed concerns that the proposed rule might result in a loss of business for FMB producers, which would have a significant negative impact on the brewery.

A small brewery in North Carolina, Carolina Beer & Beverage Company, stated that adoption of the 0.5% standard would have a ''profound adverse impact'' on both this brewery and similar small brewers. The brewery urged adoption of the majority standard instead. Carolina Beer & Beverage stated that 70% of its revenues are derived from FMBs, and it noted that it had invested significant amounts of capital and resources in order to produce FMBs that comply with longstanding Federal policies. This brewery suggested that if TTB adopted the 0.5% standard, it was unlikely that it could to maintain its competitiveness in the FMB industry and that such a standard could even threaten the company's ability to stay in business.

In addition, many distributors commented on the adverse impact of the 0.5% standard. For example, United States Beverage, a small distributor located in Connecticut, commented that it employs 85 people and that FMB products support over 70% of its revenues. This commenter stated that the proposed 0.5% standard would have ''devastating'' effects on the industry. United States Beverage also suggested that while reformulation might be only an inconvenience to the largest brewers, it would be an ''operational impossibility'' for a smaller brewer.

B. Effect on Current Products and New Product Development

In Notice No. 4, TTB sought comments relating to the effect of the proposed regulations on the viability of products currently on the market. We stated we were particularly interested in comments addressing whether products on the market could be made under the proposed standard. Additionally, we sought comments on how the adoption of the 0.5% added alcohol standard would affect taste, shelf life, stability, or other characteristics of these products. We also sought comments on whether production practices are available to produce FMBs with the desired product profile and still comply with the proposed standard. Finally, we sought comments as to whether another standard, such as the 51/49 standard, would be more appropriate for these products.

1. Comments Supporting the 0.5% Standard

Anheuser-Busch commented that it is capable of producing FMBs under the 0.5% standard and is preparing to do so. The brewer stated that its brew masters have already developed reformulated products that will be indistinguishable from the current FMB products they produce and sell. Anheuser-Busch indicated that these reformulated products would have the same clarity, aroma, and taste profile of their current products. Anheuser-Busch further stated that reformulation could be done and that no FMB producer should lead TTB to believe otherwise.

Miller also commented that its products could be produced under the proposed standard without compromising their taste or their high quality standards. Furthermore, the brewer indicated that it has successfully produced prototype products that comply with the 0.5% standard and has tested the acceptability of these products with expert tasters and others. These tests confirm that the reformulated product satisfies the taste profile of the original product.

Miller further stated that shelf life and product stability are not expected to be barriers to complying with the new standards. Miller stated that:

> Shelf life will be reduced to that of a traditional beer, i.e., approximately four months which is a significant reduction from the six to 12 month shelf life currently applicable to Flavored Malt Beverages produced today. Because it will be consistent with traditional beers, however, we do not anticipate shelf life or product stability to be an insurmountable problem with the reformulated products.

Other commenters stated that since certain brewers have already demonstrated their ability to produce FMBs in accordance with the 0.5% standard, they believe that these products will be available to wholesalers and retailers in all States with no interruption and no discernable taste differences.

Coors commented that the 0.5% standard ''is also fair because it does not prohibit any current product. Just because many of the current 'flavored

malt beverages' may need to be reclassified as distilled spirits does not mean that the TTB proposed regulation will 'kill the category,' as some might claim.'' Coors suggested that under the proposed rule, products containing 0.5% or more alcohol from the distilled spirits components of added flavors could continue to be produced, but would be regulated as distilled spirits products.

2. Comments Supporting the 51/49 Standard

While the major brewers claimed that product reformulation under the 0.5% standard would not be a problem, as previously noted in this preamble, other FMB producers suggested that this would have a significant impact on their businesses, resulting in higher costs for research and development, new equipment, and marketing, and the possibility of reduced sales due to consumer rejection of reformulated products.

Furthermore, several members of Congress expressed concerns about the costs of reformulation and the possible risks posed by such reformulations to the FMB industry. For example, one U.S. Senator stated:

> If the new formulation standards increase the costs of producing FMBs, and alter their taste such that consumers are reluctant to purchase them, the FMB market will decline. This decline in profitability will surely drive some FMB manufacturers out of the market, and reduce competition in the marketplace.

This Senator urged adoption of the 51/49 standard. Another Senator suggested that the proposed standard ''would likely change the taste and character of FMBs—products which have attained broad consumer loyalty. There is no doubt that this outcome would provide FMB's rivals with a distinct competitive advantage.''

Numerous State lawmakers opposed to the 0.5% standard commented that if TTB establishes the 0.5% standard, it would force FMB brewers to make costly changes to their current production processes. They indicated that TTB's adoption of the 0.5% standard would force FMB brewers to increase the amount of malted barley and other traditional ingredients used in an FMB, probably resulting in very differently tasting products.

As indicated earlier in this comment discussion, the Flavor and Extract Manufacturers Association of the United States (FEMA) urged TTB to reconsider the proposed 0.5% standard because it would significantly restrict the amount of alcohol contributed to the finished product from flavors, thus making it impossible for flavor chemists to satisfy the consumer desire for the distinctive FMBs currently sold.

FEMA noted that flavors contain ethyl alcohol because it is a safe, economical, and effective extraction medium for fruits, nuts, and botanicals, as well as a diluent for polar and non-polar flavor chemicals. FEMA also stated that fruit essences and distillates, which are used extensively in the creation of natural fruit flavors, contain an appreciable amount (up to 20–25%) of naturally occurring ethyl alcohol.

FEMA stated that, because of their composition, alcohol beverages require higher flavor loads to deliver pleasing characterizing flavors. It stated that while many non-alcoholic beverages use emulsions to deliver flavor systems, this is not possible in alcohol beverages because the destabilizing effect of the ethyl alcohol will produce precipitation and oil separation in the final beverage. According to FEMA, this means that the higher flavor level and the dependence on ethyl alcohol as the only reliable solvent makes it necessary to exceed the 0.5% limitation to manufacture acceptable and stable products.

FEMA noted that the ATF study referenced in Notice No. 4 found that most FMBs formulated their products in accordance with ATF Ruling 96–1. FEMA stated this has resulted in the evolution of beverages that deliver to the consumer a clean, pleasant flavor and that have a reasonable shelf life. FEMA further stated that producers have used various treatments to reduce the inherent bitterness and off-flavor characteristics associated with fermented malt beverages. FEMA suggested that if TTB limits the contribution of alcohol from flavors to less than 0.5%, that restriction would negatively impact the taste of FMBs and limit the shelf life of these products.

FEMA noted that malt-based beverages require a higher percentage of flavor addition than other alcohol beverages due to the more pronounced organoleptic properties of the malt base itself. Malt-based products have an aftertaste that is difficult to overcome. The aftertaste and malty off-characters tend to accentuate with increased exposure to heat. Limiting the amount of alcohol derived from flavor severely limits the opportunity to use vanilla, cocoa, coffee, and other botanical extracts that often require usage levels of 3% or higher in the finished products.

In conclusion, FEMA stated that limiting the contribution of alcohol content by flavors to less than 0.5% would change the overall taste profile of these products, and the consumer will ultimately receive a different tasting, less acceptable beverage. The change in flavor will be caused by a combination of increased malt base percentages and off-flavor contributed by the malt. FEMA stated that limiting either the ingredients that may be used in flavors or the alcohol contributions from flavors would make it impossible for manufacturers to continue producing many of the malt beverages being sold today and would severely limit the flavor industry's opportunity for new product development.

3. Neutral Comment

Finally, Gallo stated that it had conducted a study involving the aging of reformulated products under normal conditions to determine the impact of the proposed changes to the alcohol source standards on FMBs. Gallo studied two of its 13 FMB products, comparing their current formulation with both standards aired in Notice No. 4. Due to the limited time available, Gallo noted that it was only able to evaluate these products as they would age under normal shipping and storage conditions 3½ months after production.

After evaluating the results, Gallo determined that the study was inconclusive. According to Gallo, it appeared that the change in malt percentage impacted each product differently. Gallo concluded that ''[t]he indication is that all of our products must be studied individually to understand the full impact of the proposed change. There was no time to explore this issue in time for these comments.'' Gallo stated that, in light of the inconclusive results from the study, it took no position on the proposed definitions for beer and malt beverages.

Gallo did indicate that it plans to continue to produce and market FMBs under either of the standards aired for comment in Notice No. 4. However, it pointed out that either new standard would require Gallo to invest in new equipment to produce additional volumes of malt base. Either standard would also force Gallo to develop new malt fermentation techniques and production techniques to provide a malt base that results in products with a flavor and taste profile that meets current consumer expectations. This, Gallo noted, might require development of new technology and different equipment.

C. Effect on Competition

1. Comments in Support of the 0.5% Standard

Many small craft brewers expressed support for the 0.5% standard based on their view that the arrival of FMBs in

the marketplace has had a negative effect on sales of traditional malt beverage products. Some commenters suggested that TTB should adopt the 0.5% standard for added alcohol because this action would benefit small brewers who generally do not produce FMBs.

Many small brewers and their employees expressed their concern that the arrival of FMBs during the past years has weakened the brewing industry. They explained that over the past 25 years there has been a major revitalization of the brewing industry, with smaller brewers and brewpubs now found in every State and metropolitan area and in many small towns. They indicated that the number of microbreweries closing since the arrival of the newer FMBs has exceeded the number of microbreweries opening—reversing the trend and weakening the industry.

One small brewer stated that he expects to compete with other quality small brewers in the region, but would not like to see huge corporations with unlimited legal and marketing funds compete against him with products that are not real beer. Another small brewer commented that if he can make a wonderful tasting product with this standard, then the larger competitors could do it also. A third brewer indicated that the manner of FMB production explained in Notice No. 4 avoids many of the costs associated with the volume demands of beer production and storage. He indicated that he believes this results in an unfair competitive advantage over traditional and craft brewers.

2. Comments in Support of the 51/49 Standard

Many opponents of the 0.5% standard suggested that adoption of the standard would have an anti-competitive effect. For example, the FMBC suggested that support for the 0.5% standard appeared to come from the many industry members who, for competitive reasons, would benefit from the complete demise of the FMB category or would derive a competitive advantage from a 0.5% rule. The FMBC stated that the 0.5% standard, if adopted, would give a competitive advantage to some FMB producers at the expense of others. In support of this claim, the FMBC pointed out that America's largest brewer claimed that it could already produce FMBs meeting the 0.5% standard without compromising product taste or availability. The FMBC stated that this illustrates that, if adopted, the standard would adversely affect competition by forcing competitors to acquire technologies and capabilities similar to those apparently possessed today by the largest brewers. The FMBC added that the marketplace, not the Government, should determine the industry's winners and losers. The FMBC urged TTB to avoid crafting a rule that hands a competitive advantage to some FMB producers at the expense of others.

Mark Anthony Brands (MAB) stated that:

> [F]ederal policies favoring competition demand that TTB consider anticipated anti-competitive effects in choosing between policy alternatives and seek to adopt that alternative which promotes competitive outcomes. The 0.5% standard would favor larger companies, particularly America's (and the world's) largest brewers, and would therefore decrease competition in the FMB market segment. MAB accordingly urges TTB to reject the proposed 0.5% standard in favor of one that allows FMB producers to compete on a level playing field and supports future competition.

MAB suggested that Federal policy strongly favors marketplace competition and discourages the unhealthy concentration of market power in the hands of a few dominant players. MAB also argued that ensuring competition in the alcohol beverage industry played an important role in motivating Congress to enact the FAA Act, and it cited a provision of the legislative history of the FAA Act, which indicated that its promoters wanted to ''enable small units to get into the liquor industry.'' MAB also noted that the burdens of regulation fall disproportionately on small companies, citing a provision of the legislative history of the Regulatory Flexibility Act which recognized that even if actual regulatory costs are equal between competing large and small firms, small firms have fewer units of output over which to spread such costs and are thus unable to take advantage of the economies of scale.

As noted earlier in this comment discussion, MAB argued that TTB should abandon the 0.5% proposal in favor of the majority standard. MAB stated that the past two decades have seen the concentration of brewing capacity in the United States into a very small number of hands and that while America is home to over 1,400 breweries, the three largest brewers own the facilities responsible for producing over 90% of domestic beer and malt beverages. Noting that most other brewers are small ''micro'' and ''regional specialty'' operations that produce their own products, the commenter argued that these small brewers would not have the capacity to produce a successful new brand. MAB suggested that because of the costs of a new brewery, combined with the high failure rate of new products, production capacity presents a formidable barrier to entry to the U.S. beer market.

Accordingly, MAB stated that the ''few remaining 'old regional' brewers today represent the only realistic way to quickly access significant production capacity in the U.S.'' MAB argued that the demise of America's ''second-tier'' brewers over the past 10 years has taken vast amounts of brewing capacity off-line, and that a few old regional breweries, which currently co-pack FMB products for MAB and others, own the remaining excess U.S. brewing capacity. MAB concluded that a decline in FMB sales would ''likely'' cause these brewers to close their doors altogether and that this resulting loss of production capacity in the United States would add costs and drive jobs overseas.

MAB also suggested that the 0.5% standard represented a ''win-win'' scenario for the largest brewers if they indeed possess the technology to produce FMBs under that standard that achieve the same taste profile as existing products. MAB stated that this technology would allow them to dominate the FMB category with their products. On the other hand, if consumers reject FMBs produced under the 0.5% standard, MAB stated that ''the largest brewers will benefit because the elimination of the FMB category will protect their extensive investments in the production and distribution of traditional beer and malt beverage products.''

Several members of Congress indicated that the 0.5% standard seems designed to distort the existing market by providing an artificial competitive advantage for companies that currently dominate the domestic beer industry but that have introduced under-performing and less popular FMB products.

We also received a comment from the British Embassy suggesting that the proposed rule would place an unfair competitive disadvantage on companies based in the United Kingdom (U.K.), including the U.S. market leader, threatening jobs in the U.K. and the United States, as well as thousands of dollars in investment.

D. Effect on the Retail Licensing System and Overall Marketplace

1. Comments in Support of the 0.5% Standard

Many commenters stated that the 0.5% standard would ensure product integrity, preserve long standing distinctions imposed on beer, wine, and spirits, and provide a uniform and

consistent classification system on which States, wholesalers, retailers, and consumers can rely. They stated that, if adopted, the standard would help to maintain an orderly marketplace, meet consumer expectations for consistent products, and help sustain the long-term development of the FMB category.

According to several commenters, implementation of the 0.5% standard would avoid costly and confusing disruptions in State licensing, taxation, and distribution policies. Several retailers and wholesalers feared that any other standard could have significant consequences for the industry and for thousands of alcohol beverage licensees, most of which are small businesses. Without a clear standard, some commenters believed that the States would take action and may ultimately classify these products as distilled spirits. Such reclassification would negatively affect beer wholesalers and retailers because in certain States they would no longer be able to sell these products.

2. Comments in Support of the 51/49 Standard

In opposition to the 0.5% standard, several FMB wholesalers expressed concern that the standard would cause TTB to reclassify existing FMBs as distilled spirits. Some commenters expressed a fear that if TTB reclassifies these products, certain States will no longer permit beer wholesalers to distribute them. Some commenters pointed out that this reclassification would also affect retailers because in many States only State-operated stores can sell distilled spirits.

Many commenters, chiefly wholesalers and their employees, as well as employees of FMB producers, expressed the fear that they will lose their jobs if TTB approves the 0.5% standard. One industry association cautioned that approval of this standard would cost jobs in production facilities all across the country. Another commenter pointed out that thousands of businesses rely on sales of FMBs for revenue, from the product itself and from secondary sales. The commenter indicated that, if implemented, Notice No. 4 would threaten sales and put further pressure on small businesses already pushed to the brink.

Diageo explained that its products have generated numerous jobs throughout the country. Diageo noted that it not only employs numerous production and sales employees, but also generates work for numerous suppliers in areas such as glassware and packaging materials. Diageo stated that two of its facilities are involved in the production of FMBs and contract production has occurred at five non-Diageo facilities during the past three years.

A U.S. Senator commented that FMB bottling facilities provide jobs and millions in dollars to local economies through wages, taxes, services purchased, and other means. He stated that any regulation that threatens the market position of these products puts those jobs at risk. Other U.S. Senators commented that this proposal could have a profound and devastating impact on employees in their States and across the nation. Two U.S. Senators indicated that FMBs constitute a booming industry that has brought a direct benefit to their State, and they do not wish to see its growth and associated jobs curtailed in such an unnecessary fashion.

A wholesaler expressed concern over some small brewers' claims that the 0.5% standard will not harm America's small brewers. This commenter asserted that these small brewers have never produced an FMB product and have no intention of competing in the FMB category in the future. Since these small brewers have no stake in the outcome of this proposed rulemaking, their claims should not be considered as authoritative. Other commenters pointed out that it is not the job of TTB to favor one industry over another.

E. TTB Response

1. Regulatory Burdens and Costs Imposed by the Proposed Rule

When we issued Notice No. 4, we certified that the proposed rule would not have a significant impact on a substantial number of entities. We stated our belief that 10 or fewer qualified small breweries manufacture FMBs subject to the rule. We asked any small brewery that believed it would be significantly affected by this rule to let us know and tell us how it would affect them. We also certified that the proposed rule was not a significant regulatory action, as defined by Executive Order 12866, because it would not have an annual effect of $100 million or more on the United States economy.

After reviewing the comments, we have not changed our position on these matters. We do not believe that the proposed rule would have had a significant economic impact on small businesses, within the meaning of the Regulatory Flexibility Act. While we received many comments suggesting that there would be numerous indirect effects on wholesalers and retailers of FMBs, we received only a few comments from brewers that identified themselves as small businesses producing FMBs that would be adversely impacted by the proposed 0.5% standard.

Nor do we believe that the proposed rule would have been a significant regulatory action within the meaning of Executive Order 12866, notwithstanding the suggestion to the contrary in the ECS Study. The primary data for the analysis in that study comes from FMBC members. Because much of the economic data submitted by FMBC members is proprietary and confidential, TTB cannot verify the accuracy of the figures.

Furthermore, we are concerned that certain parameter assumptions and calculations in the ECS study are questionable and could lead to an overstatement of loss. For example, since the study separately included estimates of declines in Federal corporate tax revenue, it should have presented its estimates of declines in profits net of taxes. Under the 0.5% standard, ECS calculated that Federal corporate tax revenue would decline by $94 million in present value due to reduced profits for FMBC firms over the period 2004–2007. Accordingly, the expected after-tax decline in profits for FMBC firms would be $247 million rather than the $341 million decline in profits listed in the study. The study's use of discount rates of 20 and 30 percent to account for the increased uncertainty of future income appears to assume a large risk-premium. The treatment of capital expenditures is unclear, and the measurement of capital stock and capital losses is questionable.

Furthermore, there is a methodological flaw in deriving private and public loss totals because the ECS study looked at FMB operations in isolation, without accounting for the potential for increased sales of other types of alcohol beverages. For example, we do not agree that either the proposed 0.5% standard or the 51/49 standard would result in significant losses of Federal tax revenues as a result of lowered sales of FMBs. Even if the reformulation of popular FMB products results in lowered sales for these products, it does not necessarily follow that the Federal Government would lose tax revenues as a result. Because of changes in consumer preference and other factors, the relative market share of specific products often fluctuates. However, it is logical to assume that most of the FMB consumers who might abandon their favorite products as a result of changes in taste profile would substitute other alcohol beverages for them.

Thus, it is unlikely that any changes in the relative market share of FMB products would result in a significant net loss of the Federal excise taxes collected on alcohol beverages. Furthermore, because many FMB producers also manufacture other types of alcohol beverages, losses in sales of FMB products may be offset by increased sales of other types of alcohol beverages.

Finally, we do not believe that the economic impact on FMBC members can necessarily be extrapolated to the rest of the FMB industry based simply on market share. In fact, the FMBC, as well as other commenters opposed to the proposed 0.5% standard, have argued in this rulemaking proceeding that the 0.5% standard would benefit America's largest brewers at the expense of their competitors. The comments show that the expected costs of compliance vary from producer to producer. For example, as previously noted, Anheuser-Busch commented that it expected the total cost impact to be minimal and did not anticipate the ''slight change in cost'' to impact FMB prices for wholesalers, retailers, or consumers. Opponents of the 0.5% standard cannot argue with any consistency that the standard would unfairly benefit their competitors, while still maintaining that those competitors would suffer the same costs and losses as they would.

Nonetheless, after carefully considering all of the comments on this issue, TTB is persuaded that implementation of the proposed 0.5% standard might impose economic burdens on a sector of the FMB industry and adversely affect the viability of some small brewers who produce FMBs, as well as their ability to compete within the beer industry.

The comments indicated that while some brewers would be able to reformulate without incurring significant costs, many producers of FMBs believe that reformulation of their products to comply with a 0.5% standard would result in significant costs. The FMB producers that commented on this issue indicated that they would reformulate their products as FMBs rather than produce them as distilled spirits products. Accordingly, the costs associated with the 0.5% standard are not connected with the higher Federal excise tax imposed on distilled spirits products. Instead, these costs are brought about by the need to conduct research and development, and to invest in new equipment and technology necessary to produce FMBs that meet the 0.5% standard. Many FMB producers indicated that the costs of complying with a 51/49 standard would be significantly lower. Those FMB producers that commented in favor of the 0.5% standard did not specifically address the relative costs of the two standards, although one brewer noted that either standard would impose some costs.

In addition to the costs associated with producing new FMBs that met the new standards, many FMB producers expressed concerns that they would not be able to achieve the same taste profile under the proposed 0.5% standard, and that the 51/49 standard would afford them more flexibility in meeting the expectations of consumers in this area. These producers are concerned that if they attempt to reformulate their products in accordance with the 0.5% standard, consumers will not accept the reformulated products and product sales will go down, possibly resulting in the disappearance of some current FMB products from the marketplace.

A comment from FEMA supported this concern, noting that the 0.5% standard would make it impossible for manufacturers to continue producing many of the malt beverages being sold today and would severely limit the flavor industry's opportunity for new product development. We also find persuasive the comment from Gallo, which did not take a position on the 0.5% or 51/49 standard, but which noted the difficulty of predicting the impact of either standard on the taste profile and shelf life of FMB products.

Although the number of small brewers affected by this rule is not large, we note that several commenters indicated that there are fewer regional brewers with excess production capacity in the United States today than in the past. Many commenters indicated that the proposed 0.5% standard could have a significant impact on those regional brewers that co-pack FMBs for other companies. In particular, we are concerned that the economic impact of the proposed rule may be disproportionately borne by those small brewers who lack the economies of scale possessed by their larger competitors, and who would be less able to absorb the costs associated with reformulation of products in accordance with the more stringent 0.5% standard.

As a related matter, TTB is concerned that the proposed 0.5% rule might affect the ability of some small brewers to compete within the brewing industry. It should be noted that we do not agree with those comments that suggested that one of the purposes of the proposed rule was to protect either large or small brewers from competition with producers of FMBs. It is not TTB's intention in this rulemaking action to favor any one segment of the FMB or beer industry over another, to remove competition in the marketplace, or to destroy a particular category of malt beverages simply because it is preferred by many consumers over more traditional brewery products. Our statutory mission under the FAA Act is to promote fair competition within the malt beverage industry, not to favor one segment of the industry over another. Accordingly, the purpose of the final rule is to treat all segments of the beer and FMB industries in a fair and even fashion.

2. Options To Reduce Regulatory Burdens and Costs

Even if a rule is not a significant regulatory action, Executive Order 12866 requires us to design the regulation in the most cost-effective manner to achieve the regulatory objective.

We have considered several options to reduce the regulatory burdens and economic costs imposed by the proposed rule. One of those options is to exempt small businesses from the requirements of the rule. However, this option is not viable for several reasons. First, one of the primary purposes of the rule is to enhance consumer protection; this purpose would be defeated by an exemption for small businesses. Furthermore, some small brewers who produce FMBs do so under contract with larger companies, and allowing an exemption for these companies would raise significant fairness issues. Finally, and most important, since the IRC does not authorize such a difference in tax treatment for small producers of FMBs, we do not believe we have statutory authority to implement such an exemption by regulation.

A second option we considered was the delay of the effective date of the final rule in order to provide adequate time for the industry to make the necessary changes to product formulation. As discussed in more detail later in this document, we have delayed the implementation of the final rule for one year. We believe this one-year delayed effective date will provide ample time for the FMB industry to conform to the requirements of the final rule.

The final option we considered was adoption of the 51/49 standard instead of the 0.5% standard. Based on the information in the rulemaking record, we have concluded that compliance with the 51/49 standard will be significantly less burdensome and costly than compliance with the 0.5% standard. Furthermore, based on the

comments, it appears that adoption of the 51/49 standard would not adversely affect the ability of small brewers to compete in the FMB marketplace and would reduce the impact of the changes needed to reformulate existing products to comply with the final rule.

As we considered the comments and weighed the relative merits of the 0.5% standard and the 51/49 standard, we also considered the issues of costs and other regulatory burdens. As shown in the remainder of this document, we have tried to address these issues at each step, so that our final rule will achieve the goals of this rulemaking process—protecting the revenue, ensuring that FMB labels provide the consumer with adequate information about the identity of the product and do not mislead consumers, and setting a Federal standard for the use of added alcohol flavors in malt beverage products—while minimizing unnecessary costs and other regulatory burdens on the affected industry.

For these and other reasons set forth later in this document, we have concluded that we should adopt the 51/49 standard for beers under the IRC and for malt beverages under the FAA Act. TTB believes that by allowing FMBs to comply with the less stringent 51/49 standard rather than the proposed 0.5% standard, we meet the goals of this rulemaking proceeding and, at the same time, lessen the potential economic costs and other regulatory burdens imposed on members of the FMB industry. The other reasons for adopting the 51/49 standard are set forth elsewhere in this preamble.

VIII. The 0.5% Standard vs. the 51/49 Standard—Other Issues

A. Comments in Favor of the 0.5% Standard

1. Consistency With the IRC and the FAA Act

Many commenters found support for the proposed 0.5% standard in the IRC provisions establishing 0.5% as a dividing point between products subject to tax under the IRC and those that are not subject to tax. For example, the Beer Institute noted that the IRC ''clearly provides the Secretary with broad authority to issue and enforce regulations, to classify products for tax purposes, and to establish a workable administrative system to collect taxes.'' The Beer Institute stated that classifying intoxicating liquors based on the 0.5% cutoff has a long history, dating back to 1902 and continuing through Prohibition. Miller commented that the ''use of what could be characterized as a *de minimis* threshold such as 0.5% is a common sense approach to the regulation of alcohol beverages considering that small amounts of alcohol are present in many other beverage products such as juice, soft drinks, soda, and non-alcoholic beers made by brewers.''

Several commenters noted that the IRC and FAA Act definitions of ''beer'' and ''malt beverage,'' respectively, contemplate that the alcohol content in those products must be derived from fermentation, not from added distilled spirits. Coors argued that while some may argue that there is a difference between combining distilled spirits ''directly'' with a malt base and doing so ''indirectly'' through the addition of flavors, it believed that ''this is a distinction without a difference. Congress clearly intended to classify any alcoholic beverage that contains a mixture or dilution of distilled spirits as 'distilled spirits.' ''

Several brewers commented that neither law nor good policy supported the 51/49 standard. Coors suggested that while the proposed 0.5% standard allowed the addition of a *de minimis* amount of flavors, a 51/49 rule went beyond the allowance of a *de minimis* quantity of flavors. Anheuser-Busch stated that neither the FAA Act nor the IRC provided a basis for TTB to adopt the 51/49 standard, arguing that ''[t]he difference of only a couple of drops between a product that is 'mostly' a beer versus 'mostly' a distilled spirit would make a mockery of the law, public policy and the many years of distinction between malt beverages and distilled spirits.''

2. Consumer Deception or Confusion

Many commenters supported the proposed 0.5% standard based on the premise that it would reduce consumer confusion. These commenters included consumers, State senators and representatives, beer distributors, merchandisers, Members of Congress, State governors, State ABC commissions, breweries, national associations, State licensing and taxing authorities, State coalitions, and industry members.

As indicated in the comment overview, several thousand commenters stated that the establishment of a 0.5 percent standard would eliminate consumer confusion, preserve the integrity of the beer category, or provide beer consumers with a clear understanding of the product. Many commenters suggested that it was important to define the difference between beer and other alcohol beverages, such as distilled spirits. For example, we received thousands of comments suggesting that the proposed 0.5% standard was the best way to maintain ''clear distinctions between beer and liquor.''

Many commenters agreed that TTB has a responsibility to protect consumers through accurate labeling, to ensure that products labeled as ''flavored malt beverages'' are truly products that have alcohol obtained by the fermentation of malt. Others believed the proposed rule would promote consistency in consumer expectations, clarify Federal public policy, and end any confusion that may linger from the past or that may arise from alternative proposals.

Several commenters suggested that, in the absence of a national standard, States would enact differing standards under which the same product may be sold as a ''beer'' in one State and as a ''distilled spirits'' product in another State. The commenters suggested that these inconsistent standards would confuse consumers.

Many commenters focused on industry and consumer understanding of the terms ''beer'' and ''malt beverage.'' For example, the Brewers' Association of America (BAA), a 62-year-old trade association representing the interests of more than 1,400 small American breweries, submitted a comment in support of the 0.5% standard. The BAA stated:

> The perception of the general public is that beer is a beverage with malt flavor and hop bitterness, flavor and aroma. Many small brewers currently produce flavored malt beverages that have these characteristics. The products currently classified as FMBs and recently analyzed by TTB display none of these characteristics, and should not be considered or taxed as beer.

Many commenters stated that many FMBs do not meet the traditional definition of beer or ale and thus blur the line between spirits-based beverages and traditional beers and ales. Others argued that the consumer does not expect beer to contain added distilled alcohol from outside sources. Some suggested that it was deceptive to characterize FMBs as malt beverages since many FMBs do not resemble or taste like beer.

3. Preserving the Integrity of Beer

Many commenters stated that beer and malt beverages are unique beverages with a unique history. We received thousands of comments from the beer industry urging TTB to maintain this distinction by adopting the 0.5% standard. These commenters noted that Federal and State governments have historically regulated and taxed beer and malt beverages differently from

distilled spirits. These commenters suggested that the 0.5% standard was the only way to maintain the integrity of beer and the brewing process.

Many commenters were of the opinion that the 0.5 percent standard will ensure that FMBs are produced as traditional malt beverages using traditional brewing methods and processes. A large number of commenters stated that the classification of FMBs as beer threatens beer culture in the United States. In this regard, they pointed out that beer has unique attributes as a beverage—including malt-flavor, hop-bitterness, and aroma. Many of these commenters argued that the integrity of beer and the brewing process must be preserved.

Some commenters suggested that beer and FMBs are produced differently and should be categorized separately in the alcohol beverage market. Many commenters pointed to the history of alcohol beverages in the United States as evidence of the longstanding distinction between malt beverages and distilled spirits. They stated that these differences are well defined by the taxation structures at the State and Federal levels and these differences should be maintained.

B. Comments in Favor of the 51/49 Standard

1. TTB's Statutory Authority Under the IRC and the FAA Act

Several FMB producers suggested that TTB lacks statutory authority to impose a 0.5% limit on the use of alcohol derived from flavoring materials in the production of FMBs. It should be noted that while these commenters also believe TTB lacks authority to impose any limits on the use of alcohol derived from flavoring materials in the production of malt beverages, they nonetheless supported the 51/49 option as a matter of policy.

Authority Under the IRC. Several commenters stated that the current definition of the term ''beer'' in the IRC, at 26 U.S.C. 5052, gives brewers substantial discretion in formulating their products and places no limits on the use of nonbeverage flavors in products taxed as beer. They noted that prior IRC provisions included restrictions on producing a beverage from nonbeverage articles such as flavors, and they suggested that the current IRC's silence on the issue represents a deliberate choice by Congress not to restrict flavor use in the production of beer. Furthermore, the comments noted that the statutory definitions of beer and malt beverages do not specify any minimum amount of alcohol to be derived from fermentation. The FMBC suggested that the IRC places a practical limit on the use of flavors because of the unpleasant taste of nonbeverage flavors. The FMBC and Diageo both argued that IRC section 5001(a)(2) does not apply to products containing nonbeverage drawback flavors, and that it instead only applies to products containing distilled spirits on which tax has not been paid or determined.

Authority Under the FAA Act. Many commenters also noted that the FAA Act does not place limits on the use of flavors in a malt beverage but instead explicitly authorizes the use of ''wholesome food products'' in malt beverage production (*see* 27 U.S.C. 211(a)(7)). Furthermore, the comments suggested that since the Volstead Act explicitly restricted the use of nonbeverage flavors to make a beverage, the silence of the FAA Act indicates a deliberate choice by Congress to allow the unlimited use of flavoring materials in malt beverage production.

2. Standard Best Supported by Law

Many commenters suggested that if TTB has statutory authority to impose a limit under the IRC or the FAA Act, the 0.5% standard has no basis in Federal law; rather, the 51/49 standard is the proper standard. These commenters pointed out that in Notice No. 4, TTB indicated that IRC section 5052 also would support the issuance of a regulation requiring that a beer or malt beverage must directly derive a majority of its alcohol content from fermentation. The commenters argued that since both the FAA Act and the IRC would support such a standard, TTB did not provide sufficient reasons why it proposed the much stricter 0.5% standard.

3. IRC Regulatory Policy

Many commenters suggested that the 51/49 standard would actually protect the revenue by placing a meaningful limit on the addition of alcohol flavorings to FMBs in a manner consistent with TTB's regulatory policy. For example, one commenter argued that the 0.5% standard is punitive and has no basis in recent TTB policy. This commenter suggested that ATF Ruling 96–1 actually weakened the case for the 0.5% standard since the ruling permits the addition of up to 1.5% alc/vol derived from flavors in beer and malt beverages over 6.0% alc/vol. The commenter stated that in view of this ruling, TTB has failed to present evidence why a far stricter standard, 0.5%, should be used for the definitions of beer and malt beverages.

Some commenters stated that the proposed 0.5% standard would arbitrarily impose a more rigorous standard on FMBs and beer than TTB imposes on other alcohol beverages. The commenters allege, as examples of this disparity in treatment:

- There is no regulatory restriction on the amount of alcohol flavorings used in wine specialty products;
- Fortified wine has less stringent standards for the addition of distilled spirits to the wine base than the proposed 0.5% standard;
- Distilled spirits products may contain up to 50% wine on a proof gallon basis;
- Certain wines may be labeled with a varietal designation if 51% of the grapes are of the labeled grape variety; and
- A TTB regulation, 27 CFR 5.22(b), requires bourbon whiskey to be produced from a fermented mash of not less than 51 percent corn. The other 49 percent may come from any other grain.

Additionally, a number of commenters argued that TTB's general policy on beer ingredients, allowing as little as 25% of the fermentable ingredients to be from malted barley, is significantly more lenient than the proposed 0.5% standard. Some commenters further noted that to label a product ''beer,'' 50 percent of the fermentable base must be a grain. Accordingly, these commenters argued that the 51/49 standard was more consistent with TTB's regulatory policies than the 0.5% standard.

4. Burden of Establishing Consumer Deception

In support of their position against the proposed 0.5% standard, FMBC, as well as several FMB producers, argued that TTB failed to meet its burden of establishing that consumer deception or confusion results from use of the term ''malt beverage'' on the label of a product that derives most of its alcohol from added flavors. These commenters suggested that TTB must first produce evidence to back up its assertion that use of the term ''malt beverage'' on a label leads consumers to believe that a significant portion of the product's alcohol derives from fermentation of barley malt and other ingredients at the brewery, and must secondly demonstrate that the consumer confusion it asserts is material in that it actually affects consumers' purchasing decisions.

FMBC suggested that TTB had not met either of those burdens in Notice No. 4. This commenter argued that the notice contained no evidence of consumer confusion, cited to no

consumer survey, and did not point to a single consumer complaint about the alcohol source in FMBs. FMBC suggested that a final rule could not cure this deficiency as the APA requires TTB to provide the public an opportunity to comment on the basis of new regulations. FMBC also stated that Federal courts today virtually require survey evidence to back up a claim of consumer confusion; mere assertions of administrative expertise, without more, would not carry TTB's evidentiary burden.

Finally, FMBC suggested that TTB bears an even heavier evidentiary burden since Notice No. 4's assertion of confusion directly contradicts its predecessor's pronouncements on the same subject. FMBC pointed out that when TTB's predecessor agency, ATF, decided not to pursue further rulemaking on the use of cocktail names on labels of malt beverage coolers, it concluded, in a letter dated November 17, 1997, as follows:

> Evidence introduced indicates that flavored malt beverages are viewed by consumers as coolers or low alcohol refreshers, and not as a distilled spirits product. Evidence introduced also indicates that the presence of distilled spirits or any similarity of these products to a distilled spirits drink is not a criteria in their selection by consumers.

Accordingly, FMBC, like many other commenters, suggested that TTB's statement in the preamble to Notice No. 4 was inconsistent with the conclusion of its predecessor agency, reached just 6 years before, that consumers did not care about the alcohol source of malt beverage products. The commenters noted that ATF had reached this conclusion after soliciting public comments on the use of cocktail names in the labeling of malt beverages, and that its conclusion was consistent with consumer surveys submitted by malt beverage producers in that rulemaking proceeding.

5. Consumer Survey Conducted by the Luntz Research Companies

MAB retained the Luntz Research Companies (''Luntz'') to survey consumer beliefs about the alcohol source in FMBs, and to ascertain whether any of these beliefs were material to FMB purchasing decisions. Luntz conducted 600 face-to-face interviews of FMB consumers in 3 metropolitan areas—Baltimore, Chicago, and San Diego. The purpose of the survey was to determine if the term ''malt beverage'' led consumers to believe erroneously that the alcohol in an FMB comes from a fermentation process and whether consumer beliefs about the source of alcohol in FMBs were likely to influence the purchasing decisions of consumers.

To determine if the term ''malt beverage'' confused consumers, the research group provided respondents with a bottle of the FMB ''Mike's Hard Lemonade.'' The term ''malt beverage'' appeared prominently on the front label. The survey asked the respondents to look at the bottle and to state if they believed the alcohol came from a distillation or fermentation process, or if they had no belief about the product's alcohol source. The results were as follows:

[In percent]

No belief about the source of alcohol	80
Alcohol comes from a distillation process	11
Alcohol comes from a fermentation process	9

As noted in the table, the Luntz survey found that four out of five FMB consumers had no belief about the alcohol source in an FMB product after examining a bottle of a well-known FMB product prominently labeled as a ''malt beverage.'' Consumers who had a belief about the alcohol source roughly split into those who believed that it contained alcohol from fermentation and those who believed that it contained alcohol from distillation. Of the 9% of the respondents (54 out of 600) who believed the product derived its alcohol from fermentation, approximately 2% (14 out of 600) based this belief on the product's labeling as a malt beverage. MAB asserted that the case law requires a level of confusion far greater than 2% in order to find the existence of consumer confusion in the marketplace.

To determine whether the source of alcohol in FMBs affected purchasing decisions, the survey asked respondents to name the top two most important reasons why they drink FMBs. The results were as follows:

[In percent]

Taste/Flavor	52
New/Different/Not Beer	28
Convenience/Availability	13
Refreshing/Thirst Quenching	12
Easy to Drink/No Alcohol Taste	12
Females Like Them	9
Effect of Alcohol	6
Friends/Family Drink It	7
Given to Me/Bought For Me	5

The survey noted that not one of the 600 respondents stated that the source of alcohol was an important reason for choosing an FMB.

The survey then provided the respondents with a list of nine reasons why someone would choose an FMB, providing as one of the reasons whether the alcohol comes from the fermentation or distillation process. The respondents were asked to choose their top three reasons. The results were as follows:

[In percent]

The Taste	81
Alcohol Strength	47
Convenience	42
Cost	32
What My Friends/Family/Co-Workers are Drinking	32
Advertising and Marketing	21
The Design of the Packaging and Bottle	9
The Image I Want to Portray to People	8
Whether the Alcohol Comes from a Fermentation or Distillation Process	0.2

MAB suggested that the Luntz survey demonstrates that alcohol source is totally immaterial to the purchasing decisions of FMB consumers. When asked for their top two reasons for choosing an FMB, not a single respondent gave alcohol source as a reason. Indeed, taste-related responses topped consumers' criteria for selection, followed by the FMB's difference from beer and its convenience. Even when presented with a list of 9 reasons for selecting an FMB that included alcohol source, just one respondent chose alcohol source as a reason for selecting an FMB. MAB suggested that this evidence conclusively demonstrates that alcohol source is not material to consumers' purchasing decisions, and that to label an FMB as a ''malt beverage'' is not misleading as a matter of law.

6. Standard That Best Prevents Consumer Deception

Some commenters suggested that adoption of the 51/49 standard would better prevent consumer deception than implementation of the proposed 0.5% standard. The FMBC suggested that if TTB was concerned about consumer confusion, it had failed to bear its burden of establishing why the 0.5% standard prevents consumer deception better than a majority or 51/49% standard. As noted earlier in the comment overview, the National Consumers League (NCL) made a similar comment, noting that requiring that the product derive a majority of its alcohol content from malt fermentation would assure that an FMB actually contains a significant concentration of malt. The NCL also questioned whether source of alcohol was in any way material to consumer choice, and urged more complete labeling information on alcohol beverage containers.

As noted earlier in this comment discussion, several commenters pointed out that TTB and its predecessor agency had adopted ''majority'' or ''predominance'' standards for other products. These commenters noted that wine can constitute up to 50% of a distilled spirits product; thus, nonbeverage flavors should be able to contribute up to half (or 49%) of the alcohol content of a malt beverage product.

7. Preserving the Integrity of Beer

The FMBC noted that several supporters of the 0.5% standard cast themselves as defenders of ''traditional'' and ''age-old'' production techniques, but suggested that the brewing industry ''long ago departed from the brewing methods employed at the time current federal and state alcohol control laws were enacted.'' The FMBC suggested that several techniques currently used by brewers are not specifically authorized by law such as the use of high-tech enzymes to enhance fermentation, the use of ''high-gravity'' brewing to produce a high-alcohol product to which water is added just before packaging to make beer, new fermentation techniques that have pushed the upper strength limit of beer to 25% alcohol by volume, and the thousands of adjuncts authorized by the ARM.

The FMBC argued that ''tradition'' arguments play upon the real differences in taste and appearance between conventional beers and FMBs. However, the FMBC asserted that Federal policy long ago abandoned any taste, aroma, or color criterion for products classified as beer or malt beverages. Finally, the FMBC noted that supporters of the 0.5% standard claim that brewers can produce, under the 0.5% standard, FMBs that look and taste exactly like FMBs on the market today. Thus, claimed the FMBC, ''in a wonderfully ironic twist, supporters of the 0.5% standards wrap themselves in the banner of brewing tradition while championing a rule that will accelerate the development and deployment of high-technology processes necessary to produce an FMB under the Notice 4 standard.''

C. TTB Response

1. Statutory Authority

In the preamble to Notice No. 4, TTB set forth, in great detail, its authority to engage in rulemaking to place limits on the use of alcohol derived from flavoring materials in the production of malt beverages. After carefully considering the comments to the contrary, we have concluded that we have authority, under both the IRC and the FAA Act, to issue regulations that establish those limits.

Statutory Definitions. Fermentation is the process by which yeast converts sugar into alcohol and carbon dioxide. Both the definition of ''beer'' under IRC section 5052 and the definition of ''malt beverage'' under the FAA Act focus on fermentation as the source of the alcohol in these products.

The study conducted by ATF in 2002 established that for many FMB products, the major source of alcohol was distilled alcohol rather than fermented alcohol. The results of this study raised the question: Should a product that derives the majority (in some cases up to 99%) of its alcohol from the distilled spirits components of added flavors qualify as a ''beer'' under the IRC, and as a ''malt beverage'' under the FAA Act? TTB concluded that Congress never intended to allow such products to qualify as beers or malt beverages. At the same time, neither statutory definition explicitly excludes beverages that contain alcohol in addition to that produced during their fermentation. Accordingly, we proposed a regulation that would allow only less than 0.5% alcohol by volume derived from flavors, and we also sought comments on an alternative proposal that would require that at least 51% of the alcohol in a beer or malt beverage must be derived from fermentation at the brewery.

After carefully considering the comments on this issue, as well as the statutes that provide us with authority to issue regulations on standards for beer and malt beverages, we have concluded that we have statutory authority to limit the alcohol that may be added to ''beers'' under the IRC, and to ''malt beverages'' under the FAA Act, and to ensure that they derive most of their alcohol from fermentation at a brewery rather than from the distilled spirits components of added flavors.

Authority Under the IRC. TTB does not agree with those commenters who suggested that malt beverages may contain unlimited quantities of distilled alcohol from added flavors without falling under the statutory definition of a distilled spirit. One commenter argued that the provisions of IRC section 5001(a)(2) apply only to products containing distilled spirits on which the tax has not been paid. Because the distilled spirits used in nonbeverage drawback products are tax determined or taxpaid, the commenter argued that this section does not apply to products containing flavors.

TTB does not agree with this interpretation of the IRC. Section 5001(a)(2) provides as follows:

> (2) *Products containing distilled spirits.* All products of distillation, by whatever name known, which contain distilled spirits, on which the tax imposed by law has not been paid, and any alcoholic ingredient added to such products, shall be considered and taxed as distilled spirits.

The commenter misreads this section by suggesting that the critical issue is whether the distilled spirits contained in the product have been taxpaid. Instead, the statute clearly imposes a tax on all products of distillation that contain distilled spirits, as long as the tax imposed by law on the finished product has not been paid.

This provision of the IRC must be read in conjunction with other IRC requirements. Subject to certain exceptions not relevant here, a person who manufactures, mixes, or otherwise processes distilled spirits is a processor within the meaning of IRC section 5002(a)(5). The definition of a ''processor'' does not revolve around whether the distilled spirits in question are taxpaid or not, and neither does the imposition of tax under section 5001(a)(2). The critical issue is not whether the original distilled spirits used in the product were taxpaid; instead, the issue is whether the final product has been taxpaid as a distilled spirits product.

Furthermore, IRC section 5002(a)(8) defines the term ''distilled spirits'' to mean ''that substance known as ethyl alcohol, ethanol, or spirits of wine in any form (including all dilutions and mixtures thereof from whatever source or by whatever process produced).'' The application of this definition does not depend upon whether the spirits are taxpaid or not.

TTB also believes that those commenters who questioned TTB's authority under the IRC are overlooking our broad authority over the production of flavoring materials under the nonbeverage drawback provisions of the IRC. This authority includes the ability to ensure that nonbeverage flavors are not being misused as the primary source of alcohol in beverage products such as malt beverages.

Pursuant to section 5132 of the IRC (26 U.S.C. 5132), the Secretary has authority to issue ''rules and regulations * * * to secure the Treasury against frauds.'' This authority is not new, and it has been used in the past to issue regulations placing a 2½ percent limit on the quantity of nonbeverage drawback flavors used in the production of distilled spirits products. (*See* T.D. 5573.) Congress recognized this

regulatory limit when it enacted section 5010 of the IRC in 1980, limiting the quantity of flavors eligible for a tax credit in distilled spirits products to 2½ percent. Our broad authority to limit the use of drawback flavors in the production of alcoholic beverages also allows us to place limits on the use of such flavors in the production of beer.

Authority Under the FAA Act. The FAA Act also gives the Secretary of the Treasury authority to issue regulations to prevent deception in the labeling and advertising of malt beverages and to ensure that labels provide consumers with adequate information about the identity and quality of malt beverages. (*See* 27 U.S.C. 205(e).) One of the questions raised by this rulemaking process is whether the term ''malt beverage'' is an accurate description of a product that derives up to 99% of its alcohol from the distilled spirits components of added flavors. Our authority under the FAA Act requires us to issue regulations setting forth standards for terms such as ''malt beverage'' to ensure that use of this designation on alcohol beverage labels does not mislead consumers but instead provides consumers with adequate information about the identity and quality of the product.

Accordingly, TTB has concluded that it has authority, under both the IRC and the FAA Act, to set limits on the quantity of non-fermented alcohol, derived from added flavors, that is used in the production of flavored malt beverages.

2. Which Standard Is Better Supported Under the IRC?

In Notice No. 4, we stated that we believed that the IRC would support either the proposed 0.5% standard or the alternate 51/49 standard. After carefully examining the comments, we have concluded that valid arguments may be made in favor of both standards.

The primary argument in favor of the 0.5% standard is that it establishes a *de minimis* standard for the addition to beer of flavors containing alcohol. Essentially, the use of this a standard treats beers in the same way that soft drinks and other non-alcoholic products are treated; they may contain less than 0.5% added alcohol from flavors.

The arguments against the 0.5% standard are both practical and statutory. We are not starting from a blank slate; instead, we are facing a marketplace in which many of the most popular FMB products derive the vast majority of their alcohol content from added flavors. The policies of TTB and its predecessor agencies have allowed this practice for years. We have allowed the use of non-beverage flavors in the production of beer, wine, and distilled spirits. The IRC does not require us to adopt a 0.5% standard. Accordingly, companies that have invested millions of dollars in reliance on the existing policy argued that if TTB has discretion to implement either standard, the Bureau should choose the standard that imposes the least burden on FMB producers.

After carefully considering the comments, we agree with those commenters who stated that TTB has some discretion in this area. Beers subject to taxation under the IRC are not nonalcoholic beverages like soft drinks; thus, the 0.5% limit on added alcohol in nonalcoholic products does not apply to beers, which are already being taxed under the IRC. However, our authority under the IRC includes the authority to set standards for the production of beer and for the use of nonbeverage flavors in beer production, to ensure that the revenue is adequately protected.

3. Which Interpretation Is Consistent With Our Regulatory Policy and Practice?

After careful consideration of the comments, we have concluded that it is necessary, for purposes of implementing the relevant statutes, to adopt a limit on the use of alcohol derived from flavoring materials in the production of beer. As explained below, we believe that the 51/49 standard interprets the statutes as issue in a way most consistent with our regulatory policy on revenue classification issues.

The unlimited use of flavors containing alcohol in the production of FMBs poses a threat to the revenue. Once FMBs start deriving 51%, or 75%, or even 99% of their alcohol content from the distilled spirits components of added flavors, it can be argued that these products are properly classified as distilled spirits rather than as beers. As previously noted, the IRC definitions of these terms make it clear that beers are products of fermentation, and distilled spirits are generally products of distillation. The tax rate on beer is significantly lower than the tax rate on distilled spirits. Accordingly, allowing such products to be produced at a brewery and taxpaid as beers rather than distilled spirits renders meaningless the distinction between distilled spirits products and beers.

Clearly, a standard must be established in order to avoid the current situation whereby a product deriving as much as 99% of its alcohol content from the distilled alcohol component in added flavors is classified, and taxpaid, as a beer. Furthermore, if we do not adopt a limit on the use of added flavors containing alcohol, it is very possible that producers will find new ways to take advantage of this policy, by producing at breweries more and more products that used to be produced at distilled spirits plants. Accordingly, we believe that, at a minimum, the alcohol derived from added flavors and other nonbeverage ingredients must be restricted to less than half the alcohol content of the finished FMB product.

We are persuaded by the comments that suggested that the proposed 0.5% limit was not the appropriate standard, notwithstanding its historical use to distinguish alcohol beverages from non-alcoholic beverage products, because we are dealing here with a taxable commodity—beer—not a nonalcoholic beverage such as a soda or juice. In other words, when we use the 0.5% limitation to limit the use of alcohol from flavorings in nonalcoholic beverages, we are drawing a line between products that are subject to tax under Chapter 51 of the IRC and those that are not. However, FMBs are clearly subject to tax under Chapter 51; the only question is whether they are appropriately taxed as beers or distilled spirits.

While either the proposed 0.5% standard or the 51/49 standard would be consistent with the statutory language, we have concluded that the 51/49 limit is more consistent with TTB regulatory policy and practice. As previously noted, the revenue issue posed is how to ensure that we maintain a meaningful distinction between beer and distilled spirits under the IRC. Because the statute does not provide us with specific guidance on this issue, we are guided by our regulatory policy on similar classification issues.

With regard to those commenters who argued that the proposed limits on the use of alcoholic flavorings in the production of beer are inconsistent with our treatment of wines under the IRC, and who suggested that the regulations do not place limits on the use of flavors containing alcohol in the production of wine, we believe that these statements are not entirely accurate. In the first place, it should be noted that the statutes and regulations governing the production of wine under the IRC differ significantly from the statutes and regulations governing the production of beer under the IRC. While the IRC does not specifically authorize the direct addition of distilled spirits to beer, it does specifically authorize the addition of wine spirits to wines. (*See* 26 U.S.C. 5373.) Thus, many wines contain distilled alcohol from wine spirits.

Secondly, the IRC regulations governing the production of wine do place limits on the use of essences containing spirits. In particular, the regulations provide that where an essence contains spirits, use of the essence may not increase the volume of the wine more than 10 percent nor its alcohol content more than four percent by volume. (*See* 27 CFR 24.85.) Thus, the regulations do place limitations on the use of essences containing spirits in the production of wine. As previously noted, there is a 2½% limit on the use of drawback flavors eligible for credit in the production of distilled spirits products under 26 U.S.C. 5010.

TTB believes that because of the different statutory provisions, our treatment of the use of flavors in wines and distilled spirits does not provide clear guidance as to how to limit the use of alcohol derived from flavors in beer production. However, we believe that a more analogous regulatory provision concerns the use of wine in distilled spirits products. Regulations issued under both the FAA Act and the IRC define the term ''distilled spirits'' to exclude mixtures of distilled spirits and wine, bottled at 48 degrees proof or less, if the mixture contains more than 50 percent wine on a proof gallon basis. (*See* 27 CFR 5.11 and 19.11.) This longstanding distinction signifies the intent to distinguish between two categories of taxable alcohol beverages, wine and distilled spirits, based on a predominance standard.

4. Reasons for Adoption of the 51/49 Standard Under the IRC Regulations

After carefully considering the record, TTB has concluded that the 51/49 standard is most consistent with our regulatory policy on revenue classification issues. Accordingly, we are adopting the 51/49 standard in the regulations setting forth the standards, under the IRC, for addition of flavoring materials that contain alcohol to beer.

As noted previously, TTB has determined that the adoption of the 0.5% standard for all beers under the IRC would impose additional economic costs and regulatory burdens on the beer industry. Since we have concluded, after careful analysis of the record, that either interpretation is allowed under the relevant statutes, we are adopting the alternative that is less costly to the industry, and imposes fewer regulatory burdens.

It should be emphasized that adoption of this standard reflects a decision on a tax classification issue, and will in no way reduce the tax liability of brewers that utilize the maximum amount of flavors in the FMBs that they produce. Brewers will pay the same tax rate on beer regardless of whether the beer derives 10% or 49% of its alcohol content from added flavors. Because beer is taxed on a volume basis, a brewer derives no tax advantage by increasing the flavors content of the product to the maximum allowed by the regulations. Thus, the 51/49 standard will accord maximum flexibility to the industry in formulating their products according to the taste preferences of their consumers, without jeopardizing the revenue.

Accordingly, TTB is amending the proposed regulation in 27 CFR 25.15 to provide that flavors and other nonbeverage ingredients containing alcohol may contribute no more than 49% of the overall alcohol content of the finished beer.

5. FAA Act, Consumer Deception

After carefully considering all the comments on this issue, TTB has concluded that current FMB labels do not provide consumers with adequate information about the product. For this reason, we have decided to set new standards for use of the designation ''malt beverage'' on labels.

TTB concludes that the term ''malt beverage'' does not accurately describe a product that derives up to 99% of its alcohol content from the distilled spirits components of nonbeverage flavoring materials. However, it is important to stress that this in no way means that producers of FMBs currently on the market have intentionally misled consumers by using this term on labels. Instead, these producers have relied on the policies of TTB and our predecessor agency. Accordingly, the focus of TTB is on which standard for FMBs will best achieve our statutory mandate of ensuring that malt beverage labels adequately inform consumers about the identity of the product.

Consistency With 1997 Decision on Cocktail Names. We do not believe that our predecessor agency's 1997 decision not to pursue further rulemaking on the use of cocktail names in the labeling or advertising of malt beverages precludes us from making this decision. In the first place, we recognize that we are changing longstanding policy with regard to the labeling of FMB products; that is why we engaged in notice and comment rulemaking before implementing this change. Secondly, the proposed and final rules are consistent in many respects with ATF's 1997 decision about cocktail names. As set forth later in this document, the regulations in this final rule continue to allow the use of a cocktail name as a brand name or fanciful name of a malt beverage, provided that the overall label does not present a misleading impression about the identity of the product.

Consumer Survey Conducted by the Luntz Companies. We have carefully reviewed the results of the consumer study conducted by Luntz. The commenter that submitted this study argues that it establishes two essential points: alcohol source is immaterial to consumers, and consumers are not confused about the source of alcohol in an FMB product. We disagree.

First, we will address the materiality issue. Other commenters have raised this issue as well, noting that in 1997 our predecessor agency concluded that there was evidence indicating that similarity to distilled spirits products was not a major factor in consumers' purchasing decisions with regard to FMB products. A major producer of FMB products has submitted new consumer evidence, the Luntz survey, which purports to establish that the source of alcohol in an FMB is not a material factor in a consumer's decision to purchase the product. Accordingly, several commenters have argued that TTB can justify action based on consumer deception only if consumers are being misled in a material fashion.

TTB does not agree that the Luntz survey conclusively establishes that consumers do not care whether the product is a result of fermentation or distillation. Furthermore, we do not agree that we are required to conduct consumer surveys to find out if alcohol source is a material issue to consumers before setting standards that distinguish malt beverages from distilled spirits products.

Since the enactment of the FAA Act in 1935, we and our predecessor agencies have issued regulations setting class and type designations or standards of identity for wines, distilled spirits, and malt beverages. These standards of identity are largely based on industry and consumer understanding of the meaning of certain terms. The FAA Act provides us with authority to issue labeling regulations that will prevent consumer deception *and* provide the consumers with adequate information about the identity and quality of the product. (*See* 27 U.S.C. 205(e).)

The FAA Act provides for three broad categories of alcohol beverages: distilled spirits, wines, and malt beverages. The classification of a product within one of these categories is the most fundamental decision that must be made before the product can be properly labeled or advertised under the Act. To say that consumers do not care whether the alcohol in a product comes from

fermentation or distillation is equivalent to saying that consumers do not care whether the product is a distilled spirits product or a malt beverage. Yet, our most basic responsibility under the FAA Act labeling provisions is to provide the consumer with adequate information about the identity of the product. There can be no question that the starting point of this responsibility is informing the consumer whether the beverage is a wine, malt beverage, or distilled spirits product.

In *Federal Security Administrator* v. *Quaker Oats Co.,* 318 U.S. 218 (1943), the Supreme Court upheld revised standards of identity for ''farina'' and ''enriched farina'' under the Federal Food, Drug and Cosmetic Act. A manufacturer had challenged these standards, alleging that under the revised standards, its product, previously marketed as farina enriched with Vitamin D, would qualify as neither farina nor enriched farina. The Court of Appeals found that the Administrator's findings as to probable consumer confusion in the absence of prescribed standards of identity were speculative and conjectural, in the absence of evidence that the respondent's product had in fact confused or misled anyone. The Supreme Court overturned this decision, stressing the deferential nature of its review of the Administrator's decision. The Supreme Court rejected the argument that the Administrator relied on speculative and conjectural testimony as to whether the marketing of products that do not conform to standards of identity would tend to confuse and mislead consumers, finding that:

> The exercise of the administrative rule-making power necessarily looks to the future. The statute requires the Administrator to adopt standards of identity [which], in his judgment, ''will'' promote honesty and fair dealing in the interest of consumers. Acting within his statutory authority he is required to establish standards which will guard against the probable future effects of present trends. (*See* 318 U.S. at 228.)

Similarly, our authority under the FAA Act requires us to prescribe labeling regulations that will ensure that consumers are adequately informed as to the identity and quality of alcohol beverages.

Although the *Quaker Oats* case deals with the Federal Food, Drug and Cosmetic Act (FD&C Act), rather than the FAA Act, many of the Court's observations about the FD&C Act are equally applicable to the FAA Act. For example, the Court noted that ''the text and the legislative history of the present statute plainly show that its purpose was not confined to a requirement of truthful and informative labeling.'' (*See* 318 U.S. at 230.) The Court held that ''provisions for standards of identity thus reflect a recognition by Congress of the inability of consumers in some cases to determine, solely on the basis of informative labeling, the relative merits of a variety of products superficially resembling each other.'' (*See* 318 U.S. at 230–231.) In the same way, regardless of whether we have consumer surveys establishing that consumers care whether a product derives its alcohol from distilled spirits or beer, it is our responsibility to ensure that the label truthfully and adequately describes the contents of the product. In order to do this, we must establish basic standards for use of the terms ''distilled spirits'' and ''malt beverage'' on alcohol beverage labels.

The second issue addressed by the Luntz survey is whether current labels mislead consumers, and whether they provide adequate information about the identity of the product. MAB argues that consumers are not confused about the source of alcohol based on the fact that of the 20 percent of consumers that had a belief about the source of alcohol, less than half believed that the alcohol came from fermentation, and slightly more than half believed that it came from distillation. TTB draws very different conclusions from this survey.

The survey was conducted for a ''hard lemonade'' product labeled as a ''flavored malt beverage.'' Yet 80% of the respondents, after reading the label, had no belief whatsoever as to whether the product was derived from fermented alcohol or distilled alcohol. This would seem to indicate that the vast majority of the respondents were very confused as to the classification of this FMB product.

Because the vast majority—80%—of the respondents had no belief on this issue whatsoever, and the remaining respondents were almost evenly divided on the question, the survey clearly does not establish that current FMB labels provide consumers with adequate information about the identity of the product. Indeed, the only thing that is clear from the results of the survey is that, of the 600 FMB consumers that participated in the survey, only a very small percentage (11%) recognized that the alcohol in the product might come from distillation rather than fermentation. Thus, to the extent that the survey's results establish anything at all, they would appear to resoundingly support the conclusion that there is significant confusion among FMB consumers about the identity of these products.

As previously noted, TTB does not agree that it needs to conduct a consumer survey to establish standards for the use of labeling terms based on consumer and industry understanding of the terms. As the U.S. Court of Appeals for the D.C. Circuit has recognized, ''while consumer surveys conducted by independent experts may arguably constitute the best way to establish consumer understanding and preference * * * such surveys are not the exclusive form of probative evidence of public perception.'' (*See FTC* v. *Brown & Williamson Tobacco Corp.,* 778 F.2d 35, 41 (D.C. Cir. 1985).) Our conclusion in this matter is bolstered by comments from beer and malt beverage industry members urging us to preserve the integrity of the beer and malt beverage classifications by establishing limits on the use of flavors containing alcohol.

Based on the above analysis, TTB concludes that current FMB labels may mislead or confuse consumers by labeling as ''malt beverages'' products that derive up to 99% of their alcohol content from added flavors rather than from fermentation at the brewery. We believe that our statutory mandate to prevent consumer deception, and to ensure that alcohol beverage labels provide consumers with adequate information about the identity of the product, support an amendment to the regulations that would limit the quantity of alcohol derived from flavors in a malt beverage product.

6. Reasons for Adopting the 51/49 Standard for FMBs

After careful consideration of the record, we have decided to adopt the 51/49 standard for malt beverages under the FAA Act. We agree with those commenters who suggested that the 51/49 standard is consistent with certain other limits in our FAA Act labeling regulations. *See,* for example, 27 CFR 5.11 (the definition of the term ''distilled spirits'' excludes mixtures containing wine, bottled at 48° proof or less, if the mixture contains more than 50 percent wine on a proof gallon basis) and 27 CFR 5.22(b)(1)(i) (the standard of identity for ''bourbon whisky'' provides, among other things, that it must be produced from a mash of not less than 51 percent corn). We believe the 51/49 standard will adequately inform consumers about the identity of the product. Furthermore, as noted previously, adoption of the 51/49 standard for FMBs will minimize economic costs and regulatory burdens placed on members of the FMB industry.

IX. State Concerns

As noted in the preamble to Notice No. 4, one of our concerns in this rulemaking process has been to provide a Federal standard for the guidance of State regulatory agencies. Several State regulatory and taxation agencies expressed concerns to TTB about FMBs and requested that TTB take action to clarify their status as either malt beverages or distilled spirits. Many States have urged us to define FMBs and establish regulatory limits on the addition of alcohol to beer and malt beverages through the use of flavors. In the absence of such a Federal definition and regulation, several States have said that they will develop their own definitions for FMBs.

TTB received more than 650 comments addressing the creation of a Federal standard for beer or malt beverages or addressing Federal-State relationship issues. Thirty-one State liquor control boards, revenue departments, or other State agencies having jurisdiction over alcohol beverages, as well as one county liquor commission, submitted comments. Twenty-four of these comments supported the proposed rule. Of the remaining 8 comments, 6 supported the concept of a uniform standard for flavored malt beverages and 2 provided information about State laws without expressing an opinion on the TTB proposals.

We also received comments in support of the proposed rule from three Governors, one Lieutenant Governor, and many State legislators. A smaller number of State legislators commented in favor of the 51/49 standard.

A. Comments by State Regulatory Agencies

1. Federal Leadership Role

Several State regulatory agencies commented that it was only in the last year that they became aware of the actual composition of flavored malt beverages and that is up to TTB to establish a national standard. Some stated that a Federal definition for beer and malt beverages would ease the burden on State regulators by providing a uniform definition.

Several of these agencies also commented that individual State governments do not have the time or resources necessary to establish definitions of beer or malt beverages, or to properly identify new alcohol beverages. They suggested that the Federal Government has these resources. For example, the Delaware Alcoholic Beverage Control Commissioner noted that ''[i]f a national standard for these beverages is established, state legislatures and administrators can make an informed decision as to whether it is in the state's interest to comply with or deviate from the national standard.'' The Washington State Liquor Control Board commented that ''[a]ddressing these issues at the federal level will ensure consistency and preclude the various states from having to create separate regulations.''

2. Need for Expeditious Action

Many States urged TTB to resolve the issue expeditiously. For example, the Superintendent of the Idaho Liquor Dispensary did not express support for either the 0.5% standard or the 51/49 standard, but urged TTB ''to take action to reach a decision on a standard.'' The Director of Minnesota's Alcohol and Gambling Enforcement Division also did not express a preference for either standard but noted that the introduction of FMBs into the marketplace ''has been a complicated and confusing situation for regulators as well as the consuming public'' and stated that the Federal efforts to establish a uniform national standard were of great importance to the State. The Director of Oklahoma's Alcoholic Beverage Laws Enforcement Commission expressed his appreciation of Federal efforts to clarify issues concerning FMBs.

3. Importance of Consistent Federal Standard

Many States noted the importance of a consistent Federal standard. For example, the Director of the Montana Department of Revenue supported the proposed 0.5% standard, noting that Montana, ''like many other states, believe[s] it could be detrimental to both regulatory agencies and the industry if there are inconsistent classifications of these products in different states.''

4. States That Follow the Federal Standard

Many commenters stated that State governments have traditionally followed Federal policy in the taxation, licensing, and distribution of alcohol beverages. For example, the Kentucky Alcoholic Beverage Control Board stated that the ''Board has long felt that this standard should be set by the Federal Regulatory Authorities, not the individual states. Such Policy consistency is important because while states enjoy regulatory power over alcohol, most follow federal regulatory guidelines.''

Some comments from States indicated that they would follow the Federal standard regardless of what decision is reached by TTB. For example, a comment from the California Department of Alcoholic Beverage Control indicated that California had ''always deferred to your agency's professional expertise concerning the classification of alcoholic beverages into one of three primary categories: beer, wine, or distilled spirits'' and it intended to continue deferring to TTB's classification of FMBs. A comment from the Comptroller of Maryland and its Alcohol and Tobacco Tax Division supported the proposed 0.5% standard but stated that Maryland ''adopts federal standards with respect to labeling and content of alcoholic beverages'' and thus was ''prepared to apply whatever standards your agency ultimately determines to be most appropriate.''

5. Possibility of Unilateral State Actions To Classify FMBs

Several State agencies commented that without prompt action by TTB, it would be necessary for them to undertake this regulatory activity on their own. For example, Maine's Department of Public Safety Liquor Licensing Division commented that if TTB delays or fails to adopt the proposed 0.5% standard, many States ''will find the need to act under their independent authority to determine the alcohol beverage category, label disclosures, tax, necessary wholesale and retail license requirements in order to continue the selling of these products in their state.''

Some States have already begun regulatory proceedings on this issue. The Nebraska Liquor Control Commission commented that it has already determined that FMBs containing more than 0.5% alcohol derived from distillation should be classified as distilled spirits, and has set a deadline for industry compliance with this standard. The Tennessee Alcoholic Beverage Commission commented that it had already conducted administrative proceedings on the classification issue and that it believed that TTB's proposed 0.5% standard would be consistent with the position taken at its hearing. The issuance of an order in this matter is awaiting the TTB final rule.

Other States commented that they would defer action pending completion of the TTB rulemaking proceedings. A comment from the Virginia Department of Alcoholic Beverage Control noted that while Virginia had accepted Federal classification of products in the past, under State law a product containing alcohol from spirits and beer is classified as a distilled spirits product, even if the majority of the alcohol is contributed by beer. The commenter suggested that TTB's recent study revealed that most FMBs were

incorrectly classified in Virginia, and stated that the Department was delaying action pending the outcome of the TTB rulemaking.

A comment from the Massachusetts Alcoholic Beverages Control Commission expressed support for the proposed 0.5% standard, stating that the Commission ''in the past has substantially deferred to federal standards concerning the identity of a specific product, but the information that has come to light recently during the review and discussion of FMB is troubling to the Commission.'' This commenter indicated that Massachusetts is deferring taking any action pending completion of the TTB rulemaking process.

6. Tax Issues

Some State agencies focused on the taxation aspects of the proposed 0.5% standard, suggesting that taxing FMBs as distilled spirits would have positive revenue effects. For example, a comment from the Maryland Comptroller and Alcohol and Tobacco Tax Division suggested that it seemed ''inherently unfair to tax a product as a 'malt beverage' when the majority of the alcohol by volume contained in the product is from distilled spirits (flavoring or otherwise).'' Delaware's Office of Alcoholic Beverage Control Commissioner commented in support of the proposed regulation and stated that its concerns were not with distribution, but with ''the tax issue and the substantial reduction in the rate paid for beer * * * versus the rate paid for 'low spirits' * * *. Obviously, the amount of money in controversy is large for the State, the industry, and the consumers.''

7. Consumer Deception

Several State agencies focused on the issue of consumer confusion or deception. For example, a comment from Florida's Division of Alcoholic Beverages and Tobacco supported the 0.5% standard as a ''positive step toward providing consumer information and avoiding confusion.'' A comment from Kentucky's Alcoholic Beverage Control Board stated that the proposed 0.5% standard ''maintains the clear distinction between malt beverages and distilled spirits that were becoming blurred in the minds of many regulators, including Kentucky.'' The Oregon Liquor Control Commission stated that while FMBs were made in breweries, distributed through beer distribution channels, and taxed as beer, they discovered that ''their alcohol is mainly or completely from distilled spirits sources, and their appearance and taste usually do not resemble beer. Customers, along with regulators, have been unsure what this hybrid product really is.''

8. State Law Issues

In Notice No. 4, TTB solicited comments on whether States would have to enact new legislation if TTB amended its regulations to establish either the 0.5% standard or the 51/49 standard. Some States advised that the proposed 0.5% standard would not require amendments to State law, but they did not address the issue of whether a different standard would be inconsistent with State law. For example, the Oklahoma Alcoholic Beverage Laws Enforcement Commission advised that under Oklahoma's constitution, alcohol beverages were taxed and regulated based on whether the alcohol content of the product exceeds 3.2%, regardless of whether the alcohol content is derived from brewing or distilling.

A comment from the Georgia Department of Revenue advised that the proposed 0.5% standard would most likely cause the State to enact new legislation, because Georgia's alcoholic beverage code did not anticipate such products. However, this comment noted that, regardless of the standard, it might be necessary for the State to enact legislation in order to bring clarity to the issues of taxation and distribution.

Only a few States indicated that adoption of a standard other than the 0.5% standard would be inconsistent with State law. A comment from the Virginia Department of Alcoholic Beverage Control stated that while adoption of the proposed 0.5% standard would be consistent with State law, any standard allowing a higher percentage of alcohol from a source other than the brewing process would create a potential conflict with current State law, which classifies products containing mixtures of beer and distilled spirits as distilled spirits products, regardless of whether the majority of the alcohol is contributed by the beer. The Arkansas Alcoholic Beverage Control Division indicated that if TTB allowed the use of distilled spirits products as a flavoring agent, legislative changes would be required in Arkansas if this product was to be sold by beer-only permittees.

B. Other Comments in Support of the 0.5% Standard

Hundreds of brewery employees submitted comments stating that without the proposed 0.5% standard, brewers, wholesalers and retailers may face a patchwork of individual State laws and regulations, where the same product may ultimately be sold as ''beer'' in one State and as ''hard liquor'' in another. These comments suggested that this was already happening in Nebraska and will almost certainly happen in other States as well. Other commenters pointed out that such different standards could result in subjecting a product to two entirely different sets of laws and regulations regarding production, distribution, place of sales, labeling, and advertising. Many commenters stated that this discrepancy would jeopardize nationwide marketing and distribution efforts by industry members.

A State lawmaker commented that clear definitions of alcohol beverages are important for the State legislative process. Without definitions, the State legislatures cannot study and act on beverage alcohol issues in an educated and professional manner.

Several members of the beer industry supported the 0.5% standard as being most likely to resolve the concerns of State administrators. For example, the Beer Institute commented that the 0.5% standard is the best option to maintain consistency among existing Federal and State statutes and regulations. While noting that State officials must utilize their respective definitions of alcohol beverages, the Beer Institute suggested that almost all of the States that have reviewed the issue can reconcile their statutes and regulations with the TTB proposal, but that this is not true of alternative standards.

The Beer Institute suggested that implementation of an alternative standard would:

> unravel the consensus and relative stability that have been achieved to date with respect to state statutes and regulations. The alternative discussed in Notice No. 4, a standard permitting a 51–49% blend of malt beverage and distilled alcohol would require many changes in existing state tax and regulatory systems or even worse, a return to state-federal conflicts and inconsistent regulation.

Anheuser-Busch predicted that:

> there will be complete disorder in the nationwide marketplace if FMBs are permitted to contain 49 percent distilled spirits alcohol under federal law, yet most states would only permit 0.5% spirit alcohol. A patchwork of states regulating identical products as distilled spirits in most states, and as beer in others, would cause havoc and tremendous consumer confusion.

As one example of the confusion that could be caused by differing State classifications of the same product, the brewer noted that television advertisements regularly cross State lines.

Anheuser-Busch also suggested that while the 51/49 standard is nowhere to

be found in State laws, many State laws incorporate a 0.5% alcohol by volume threshold in their definitions of malt beverages and distilled spirits; accordingly, adoption of the alternative 51/49 standard by TTB would be disruptive to the system of State laws. The brewer suggested there is no basis to support the alternative standard in existing State laws, and that such action would create a conflict between Federal and State law. Additionally, Anheuser-Busch stated that such Federal action would trigger disruptive State action since many States would no longer follow TTB guidance, but would instead have to develop and/or enforce their own 0.5% standard, ''effectively ending federal leadership on the most important alcohol regulation issues.''

Coors commented that the 0.5% proposal is consistent with TTB's role under the 21st Amendment and noted that it is the only approach or proposal consistent with the vast majority of the different State laws. Accordingly, Coors suggested that the 0.5% proposal ''thus fulfills TTB's role as a leader of the states' regulatory and tax collecting organizations.'' Coors acknowledged that ''[e]xamples of differences in the regulation of malt beverages at the state level do exist,'' but suggested that ''only the TTB proposed regulation provides comity to the states and a marketplace free from disruption * * *.'' Miller suggested that, given the support of the States for the proposed 0.5% standard and the reality of the FAA Act's penultimate provision, ''considering other standards would be detrimental to the creation of a uniform standard.''

C. Other Comments in Support of the 51/49 Standard

Supporters of the 51/49 standard challenged those comments that suggested that only the proposed 0.5% standard would meet the needs of the States and result in a uniform Federal standard. These commenters argued that while a national standard would be beneficial, TTB has provided no evidence in Notice No. 4 as to why the proposed 0.5% standard is the only way to accomplish this goal. Several commenters stated there is no reason to assume the proposed 0.5% standard for added alcohol is the only standard supported by the various State authorities.

The FMBC noted that Federal law remains independent of State law and that the views of State officials are not binding on TTB. The FMBC stated that while it commended TTB for seeking to craft a national standard to respond to State concerns, TTB should not regulate to the ''least common denominator'' and elevate the opinions of a few State regulators above other considerations it must weigh.

The FMBC further stated that all States today classify FMBs as ''beer,'' ''malt beverages,'' or an equivalent statutory term. The FMBC suggested that while definitions vary from State to State, many resemble in material respects one of the two Federal definitions. Like these Federal statutes, State statutes are silent on the issue of how much alcohol nonbeverage flavors can contribute to a malt beverage or beer. Accordingly, the FMBC argued that even assuming that this silence could support the imposition of limits on the use of flavors, it would allow State regulators to adopt either a majority standard, a 0.5% standard, or some other standard.

The FMBC also challenged the characterization by other commenters of State laws on this issue. The FMBC noted that some supporters of the 0.5% standard suggest that the presence of a 0.5% alcohol by volume threshold in many State statutes requires those states to limit the alcohol contribution of flavors to that *de minimis* amount. However, the FMBC pointed out that these thresholds do not address the formulation of products but instead constitute a threshold that divides taxable alcohol beverages from products containing alcohol that are not subject to taxation. The FMBC stated that it was aware of no State statute that sets 0.5%—or any other figure—as the mandatory limit on the amount of alcohol that flavors or other alcohol sources can contribute to a malt beverage. The FMBC also noted that if such an interpretation prevailed, many States would have to reclassify wines that derive alcohol from flavors or spirits.

The FMBC argued that while some States have expressed support for Notice No. 4, none to date had indicated that they could not accept a majority standard. Finally, the FMBC stated that in 2002, the Joint Committee of the States (a body that represents the interest of alcohol regulators from both the ''control'' and ''open'' States) voted to recommend that States support a position that more than 50% of the volume of a finished FMB come from the product's beer/malt beverage base. The FMBC suggested that such a standard would be more lenient than the majority standard that FMBC can accept.

D. TTB Response

We agree with those commenters who suggested that the originally proposed 0.5% standard would give States guidance in classifying FMBs. However, we have concluded that the 51/49 standard would achieve the same goal, with less cost to the industry, as discussed earlier in this document. We agree with those commenters who suggested that the 51/49 standard will achieve our regulatory goal of establishing a uniform standard that provides a meaningful distinction between FMBs and distilled spirits products.

It is noteworthy that, while most of the comments from State regulatory agencies supported the proposed rule, only a few of these comments specifically opposed the majority standard. Several State regulatory agencies did not specifically support either standard, but simply supported TTB's action in trying to resolve this difficult issue by setting a uniform standard.

Furthermore, while a few States suggested that any standard other than 0.5% would be inconsistent with their State laws or regulations, none of these comments pointed to laws that specifically restricted the use of alcohol derived from nonbeverage flavors in FMB production. Like Federal law, many State laws use 0.5% alcohol by volume as the dividing point between products subject to tax and other regulations, and those that are not. Similarly, some State laws classify mixtures of beer and distilled spirits as distilled spirits products. However, we are not aware of any current State statutes that specifically regulate flavor use in FMB production, although at least two States have apparently initiated administrative procedures to establish such a policy.

Several States have indicated that they will not follow TTB's lead if we adopt an alternative to the 0.5% standard. Other States have indicated that they will follow the Federal standard, regardless of what it is. TTB's role is to provide Federal leadership on this issue. However, it is up to the States to decide whether they want to follow Federal standards or not.

Clearly, many brewers are concerned over facing a multitude of different State laws and regulations. Pursuant to the 21st Amendment, States have significant authority to regulate the sale and distribution of alcohol beverages within their borders. Under the penultimate clause of the FAA Act, Federal labeling and advertising regulations apply to malt beverages only to the extent that the State has adopted similar requirements for malt beverages sold within the State. Accordingly, brewers, wholesalers and retailers must

follow State laws on these issues, regardless of what standard TTB adopts.

We recognize that our adoption of the 51/49 standard may mean that some States will adopt a standard that differs from the Federal standard. However, as many commenters noted, State requirements on alcohol beverage classification issues already vary from State to State. We do not believe that the adoption of a different standard by some States will cause major problems to the beer industry; in any case, it is beyond TTB's authority to control what the States choose to do on this issue. We would note, however, that although TTB is adopting the 51/49 standard for FMBs, brewers are free to adopt the stricter 0.5% standard for their own FMB products, thus ensuring compliance with those State laws and regulations that are amended to incorporate this standard. Finally, by adopting a one-year effective date provision for this final rule, we hope to provide States with an adequate period of time in which to decide whether they wish to follow the Federal rule or not, and to make any corresponding changes in their own laws or policies.

X. Mandatory Alcohol Content Labeling for FMBs

TTB received 31 comments expressing opinions about the proposed mandatory alcohol content labeling for flavored malt beverages. Five commenters were brewers, six were from State licensing or regulatory agencies, seven were from interest groups, six were from individuals, and smaller numbers were from other sources. Although we received thousands of form letters supporting the Notice No. 4 proposals, none of these letters specifically addressed alcohol content labeling.

A. Comments Supporting the Proposal

Miller supported the proposed alcohol content labeling requirement for FMBs and other malt beverages that derive any alcohol from added ingredients. Miller's comment stated that it would oppose a requirement to label all malt beverages with an alcohol content statement. Miller also commented that the regulations should provide flexibility by allowing the alcohol statement on any label rather than on the brand label (front label) as proposed. Miller commented that allowing the alcohol content statement on any label is consistent with other mandatory labeling requirements such as the Government warning label, and that the proposed placement on the brand label is unnecessary since there is no empirical evidence concerning consumer confusion over the alcohol content of FMBs.

Two State liquor authorities supported the Notice No. 4 proposal to require alcohol content labeling on FMBs and other malt beverages that derive alcohol content from sources other than the brewing process. They agreed that this alcohol content labeling is necessary because of the similarity of some FMB labels to distilled spirits labels and because of the need to distinguish FMBs from non-alcohol products. Both States cited the importance to consumers of having alcohol content information available on malt beverage labels.

B. Other Comments

Several commenters opined that the proposed alcohol labeling requirement should not be restricted to FMBs and other products containing added alcohol but should apply to all malt beverages. These commenters generally stated that there was no reason to single out FMBs for mandatory alcohol content labeling. Diageo commented that Notice No. 4 provides no basis for requiring alcohol content statements only on the labels of malt beverages that derive alcohol from added flavors or other ingredients. Diageo stated that the intended alcohol content labeling bears no relationship to its cited justification in Notice No. 4, where TTB stated that consumers may believe either that spirits-branded malt beverages contain the same high alcohol content as distilled spirits or that other FMBs may contain no alcohol due to their unconventional appearance. As an example of the contradictory policy this requirement would cause, Diageo asserted that the regulations would not require alcohol content labeling on a product with a distilled spirits brand name such as ''Jack Daniels Pilsner'' but would require alcohol content labeling on a traditional malt beverage product made with alcohol flavoring materials like ''Strawberry Blonde Ale.'' Diageo further stated that they have placed alcohol content on labels of their FMBs since 2000.

Brown-Forman also commented that TTB has no basis for treating FMBs differently from other malt beverages. Brown-Forman argued that alcohol content labeling is important consumer information that should be required for all malt beverages. Gallo also supported extending alcohol content labeling to all malt beverages but requested that it be optional because of labeling prohibitions in Oklahoma and New York State.

The FMBC commented that alcohol content is important consumer information and that all of their member companies place that labeling on their FMBs. This trade association noted that although nearly all FMBs fall within a 5.0 to 5.5 percent alcohol by volume range, so-called traditional malt beverages contain between 4% and 25% alcohol by volume, a much wider range, making alcohol content labeling more meaningful for so-called traditional malt beverages than for FMBs. Since most malt beverage labels do not contain alcohol content information, the FMBC claims that consumers are less informed and more confused about the alcohol content of other malt beverages. The FMBC therefore urged TTB to require alcohol content labeling on all malt beverages.

CSPI similarly urged TTB to adopt alcohol content labeling for all malt beverages, stating that there is no reason to require such labeling only for FMBs and other malternative-type products, but not for all malt beverages. Another consumer organization, the NCL, also supported mandatory alcohol labeling for all malt beverages. The NCL stated, ''Mandatory labeling will provide consumers with the information they need to make better, more informed choices about alcoholic beverage consumption.''

Anheuser-Busch opposed the proposal to require alcohol content labeling on FMBs and other malt beverages containing alcohol from added ingredients. Anheuser-Busch stated that consumers do not assume malt beverages with distilled spirits brand names are higher in alcohol content, noting also that most FMBs already have alcohol content labeling. Anheuser-Busch further stated that any alcohol content labeling should be at the discretion of the brewer and should not be applied to only one kind of malt beverage.

C. TTB Response

The intent of TTB's proposal for alcohol content labeling was to provide this important information to consumers who may not be familiar with FMBs, or who may be misled by distilled spirits brand labels into believing that their alcohol content is higher than of other malt beverages. For the reasons outlined in the preamble to Notice No. 4, TTB is adopting the amendment to § 7.22(a) to require alcohol content labeling on the brand labels of malt beverages that derive any amount of alcohol from flavors or other ingredients containing alcohol. TTB believes this requirement will provide consumers with better information about these malt beverage products and will help prevent consumer confusion over their identity. Moreover, this requirement applies to

the addition of flavors or other nonbeverage materials containing alcohol at any step in the production process. At the same time, we are modifying the new § 7.22(a)(5) text to exclude from this requirement the use of hop extract that contains alcohol since hops are an essential ingredient in the production of malt beverages. It should be noted, however, that TTB will count any alcohol contained in added hop extract toward the 49% limitation under the 51/49 standard.

TTB notes that the final rule text, like the proposed rule text, does not separate FMBs that derive a substantial portion (up to 49%) of their alcohol content from added flavors from those traditional malt beverages that contain small amounts of added alcohol from flavors. Thus, this alcohol content labeling requirement applies to flavored beers, flavored ales, and so forth that are produced using alcohol flavorings.

While many comments supported alcohol content labeling for all malt beverages, TTB is unable to issue such a broad regulation at this time. In Notice No. 4, we specifically stated that we were not proposing to require alcohol content statements on all malt beverage containers at that time. Thus, we have not aired this issue for comment. We also believe that such a requirement represents a significant departure from past labeling requirements that, until the addition of § 7.71 in 1993, actually prohibited the placement of alcohol content statements on malt beverage labels (unless required by State law), due to the prohibition within the FAA Act (this prohibition was found to be unconstitutional in *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476 (1995)). Thus, while we are not unsympathetic to the comments suggesting mandatory alcohol content labeling for all malt beverages, we are not in a position to implement such a rule without notice and public comment. We also note that we have received several petitions from various consumer and public interest groups for additional labeling information on alcohol beverage containers, including alcohol content labeling. TTB intends to pursue these labeling issues in future rulemaking.

TTB acknowledges Gallo's comment regarding two States' prohibition of alcohol content statements on malt beverage labels. Pursuant to the penultimate paragraph of the FAA Act, the labeling requirements of the FAA Act apply only to the extent that State law imposes similar requirements on malt beverages sold within the State. Thus, brewers have to comply with the labeling laws of the State in which the malt beverages are being sold.

We recognize that brewers may be required to print different labels for malt beverages intended for sale in those States in which alcohol content statements on malt beverage labels are prohibited. However, TTB does not believe this is a sufficient reason not to adopt mandatory alcohol content labeling statements for malt beverages that derive alcohol from flavors or other ingredients. Brewers have always been required to conform labels to State requirements when those requirements conflict with part 7 requirements under the FAA Act.

With regard to the requirement that the alcohol content statement appear on the brand label, we have concluded that consumers are more likely to notice the statement if it appears on the brand label. Furthermore, this requirement is consistent with the regulations applicable to the mandatory alcohol content statements for wine (*see* 27 CFR 4.32(a)(3) and distilled spirits (*see* 27 CFR 5.32(a)(3)).

XI. Use of Distilled Spirits Terms on Labels and in Advertisements

A. Comments Received

TTB received 10 comments addressing the proposed limitations on the use of distilled spirits terms in malt beverage labeling and advertising. Three of these comments came from brewers, two were from State licensing and regulatory agencies, and the rest were from other sources. The majority of the comments favored limiting the use of distilled spirits terms on FMBs.

Several brewers requested assurances that the policy in ATF Ruling 2002–2, allowing the use of distilled spirits brand names on FMBs, will continue. They commented that industry members have made large investments in the labeling and advertising of these distilled spirits brand names based on existing government policies.

Several commenters believed the proposed language of §§ 7.29 and 7.54 is vague, and they requested clearer language that directly addresses TTB's stated purpose. The Washington Legal Foundation, a nonprofit public interest law and policy center, submitted a comment in opposition to the proposed language, asserting that the regulation would not accommodate the First Amendment rights of malt beverage industry members to make truthful statements about their products.

One commenter pointed out that the use of certain non-misleading statements would be prohibited by the proposed limitations on the use of distilled spirits terms on FMBs. This commenter cites a statement of ''having the color of dark rum'' as a truthful statement that describes the color of an FMB product but which would be prohibited. Another commenter cited the example of ''Beer aged in Bourbon Barrels'' as a truthful, informative statement that would similarly be prohibited by the proposed regulations.

B. TTB Response

We are incorporating the general holdings of ATF Ruling 2002–2 into §§ 7.29 and 7.54. However, in response to the comments received on this issue, we are modifying the language of the regulation to clarify that the regulation prohibits only those labeling and advertising representations that tend to create a false or misleading impression that the malt beverage contains distilled spirits or is a distilled spirits product. In addition, we are keeping ''safe harbor'' provisions in §§ 7.29 and 7.54 that incorporate the specific practices that we do not consider misleading.

The proposed language in §§ 7.29 and 7.54 was patterned after the existing language in 27 CFR part 4, Labeling and Advertising of Wine. In response to the issues raised by the commenters, we are revising these sections to clarify that we are not banning truthful and non-misleading speech about malt beverage products. Instead, we are incorporating the holdings of ATF Ruling 2002–2, which were intended to ensure that labeling and advertising statements comparing FMBs to distilled spirits products do not mislead consumers.

ATF Ruling 2002–2 noted the existence of a recent trend in the marketing of FMBs. Brewers and importers had begun to associate FMBs with well-known brands of distilled spirits, by using distilled spirits brand names as the brand names for FMB products; by using labeling and packaging that resemble the labeling and packaging of well-known distilled spirits brands; and by the use of specific distilled spirits terms in describing flavorings added to malt beverages. The ruling noted that these products were drawing media attention, in part because of the impression given that these FMBs are made with distilled spirits or contain distilled spirits. Certain FMBs were using labels that used distilled spirits brand names or distilled spirits class and type designations to describe a flavor element as part of the statement of composition on the label. For example, these labels used a distilled spirits brand name, and then stated ''Flavored malt beverage made with natural flavors containing vodka'' or ''Flavored malt beverage with natural flavors containing

genuine [Distilled Spirits Brand Name].''

The ruling held that such statements were misleading. The labels create the misleading impression that the product is made with, or contains, distilled spirits. In fact, however, distilled spirits used to manufacture flavors lose their class and type when blended with other ingredients to make a flavor extract. Thus, it is misleading to represent that the malt beverage contains a particular class or type of distilled spirits, such as vodka, rum or tequila. Furthermore, this kind of labeling created the misleading impression that the product contained distilled spirits, or in fact was a distilled spirits product.

Accordingly, the purpose of the ruling was to set forth specific labeling and advertising statements that would be considered misleading. The ruling held that the use of a brand name of a distilled spirits product as the brand name of a malt beverage was not in itself misleading. However, the use of a distilled spirits term found in the standards of identity in 27 CFR part 5 (such as whisky, rum, vodka, brandy, gin, and so forth) as the brand name for a malt beverage or as part of the statement of composition or as the fanciful name of a malt beverage, is misleading. The use of a cocktail term as the fanciful name of a malt beverage would not be considered misleading if the overall labeling and advertising does not create a misleading impression about the identity of the product.

TTB still takes the view that the use of a distilled spirits brand name as the brand name of an FMB is not inherently misleading. Furthermore, we do not believe that the use of a cocktail name as part of a fanciful name of an FMB is always misleading, as long as the remaining labeling and advertising of the product do not create a misleading impression as to the identity of the product. We are not changing our position with respect to these issues.

In response to the concerns voiced by the commenters, we are changing the wording of the amendments to §§ 7.29 and 7.54 contained in the proposed rule. Instead of the specific prohibitions proposed in those sections, we are adding the following to the prohibited statements with respect to labeling and advertising of malt beverages:

> Any statement, design, device, or representation that tends to create a false or misleading impression that the malt beverage contains distilled spirits or is a distilled spirits product.

Because this language prohibits only labeling and advertising statements that are false and misleading, it does not infringe upon the First Amendment rights of producers and importers of FMBs. Information on alcohol beverage labels is considered commercial speech. (*See Rubin* v. *Coors Brewing Co.*, 514 U.S. 476, 481 (1995).) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not false or misleading. (*See Central Hudson Gas & Electric Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557, 563–564 (1980).) Similarly, our statutory authority under the FAA Act is to ensure that labels provide consumers with adequate information as to the quality and identity of malt beverages, and to ensure that labels and advertisements for such products do not tend to mislead consumers. (*See* 27 U.S.C. 205(e) and (f).) It is not TTB's intention to prohibit any labeling or advertising statements that are truthful and non-misleading.

The final rule regulatory texts incorporate the proposal to prohibit the types of references to distilled spirits brand names and class and type designations in FMB statements of compositions that were addressed in ATF Ruling 2002–2. However, those texts will allow truthful non-misleading statements that may draw similarities between the taste or character of a malt beverage and the taste or character of a distilled spirits product, but that do not imply in a false or misleading fashion that the product contains distilled spirits or is a distilled spirits product. Moreover, this general prohibition will not prohibit truthful and non-misleading statements such as ''beer aged in whiskey barrels'', provided that such a statement is not in the context of implying that the FMB contains whisky as the result of the aging process. Finally, this standard will not prohibit the use of cocktail terms as a brand name or fanciful name on malt beverage labels or in advertising provided the use of those terms does not draw a misleading comparison between the two types of alcohol beverages. To the extent that labeling or advertising comparisons between malt beverages and distilled spirits are false or misleading in a manner that is not covered by these new regulations, they would fall under the general prohibition on the use of false or misleading statements in the labeling or advertising of malt beverages. (*See* 27 CFR 7.29(a)(1) and 7.54(a)(1).)

ATF Ruling 2002–2 held that certain labeling and advertising practices by themselves are not misleading if their use does not give a misleading impression about the malt beverage. The ruling specifically held that the use of a brand name of a distilled spirits product as the brand name of a malt beverage is not in itself misleading. The ruling further held that the use of a cocktail term as the brand name or fanciful name of a malt beverage is not misleading if there is no misleading impression about the identity of the product, based on the overall labeling and advertising of the product.

Consistent with the proposed rule, and in response to the comments that specifically request affirmation that the use of distilled spirits brand names will be permitted, we are incorporating these ''safe harbor'' provisions from the ruling into §§ 7.29 and 7.54. We are reconfiguring the text as three subparagraphs in § 7.29(a)(7) and § 7.54(a)(8). Subparagraph (i) permits the truthful statement of alcohol content in labeling and advertising in conformity with existing requirements in § 7.71. Subparagraph (ii) in each case permits the use of a distilled spirits brand name as the brand name of a malt beverage provided the overall label or advertisement does not present a misleading impression about the identity of the product. Similarly, subparagraph (iii) permits the use of a cocktail name as the brand name or fanciful name of a malt beverage, with the same proviso.

XII. New Formula Requirements

TTB received a small number of comments from brewers and brewery trade associations on the proposed new formula filing requirements that would replace the existing statement of process. These commenters generally favored the new formula filing requirements, but they expressed concerns regarding certain aspects of the proposal and requested that TTB clarify some of the proposed formula requirements.

A. Fermented Products Requiring Formulas Under § 25.55

1. Comments Received

Several brewers and brewing industry trade associations commented on the proposed requirements that would trigger the filing of a formula by a brewer. These commenters requested that we more clearly communicate which fermented products require filing formulas.

One brewer stated that because of the wording of the proposal, it appears that most fermented products would require a formula. A brewery trade association argued that the requirement to file formulas showing special processing is so broad that the proposal would require brewers to file formulas for most products. This association noted that many traditional malt beverages contain

fruits, herbs, spices, or honey and that the proposed requirement to file a formula for fermented products containing any of these ingredients would greatly increase the number of products for which a formula is required. The association further alleged that products containing some of these types of ingredients are considered traditional malt beverages or beer and that, therefore, filing formulas for them would simply increase the number of formulas filed without assisting TTB in classifying them for tax purposes. One brewer and one trade association suggested adding a paragraph to the formula requirements in § 25.55 to state that a formula is not required when processes or ingredients are used in the production of traditional beers.

One brewer commented that proposed § 25.55 requires a formula when honey is used but does not specifically require a formula when maple syrup is added to beer. Further, this brewer commented that TTB should rewrite § 25.55 in the final rule to require formulas only for beer made with the use of processes or ingredients that the TTB Administrator has not declared as standard brewing processes or ingredients. TTB would then implement this regulation by periodically publishing a list of processes or ingredients declared to be traditional and therefore not requiring the filing of a formula for their use in beer production.

2. TTB Response

The formula requirement proposed in § 25.55 would replace the statement of process now required by § 25.67. The existing section currently requires brewers to file a statement of process whenever they propose to produce a fermented product not marketed as ''beer,'' ''ale,'' ''porter,'' ''stout,'' ''lager,'' or ''malt liquor.'' As several commenters noted, some traditional malt beverage products are made with added flavors but are marketed under those traditional designations and not as flavored or specialty products. Because of the present wording in § 25.67, which uses the marketing designation as the filing criterion, some brewers may not file a statement of process for some fermented products that contain flavors or other materials. While these fermented products do not require a statement of process under § 25.67, the proposed regulation would require a formula and perhaps additional labeling for these traditional fermented products.

The intent of this proposal was not to require a statement of process or formula for additional kinds of fermented products. Rather, it was intended to clarify which fermented products require the filing of a formula. Thus, in this final rule document, we have changed § 25.55 in order to state more clearly when a brewer must file and receive approval of a formula in order to produce a fermented product. We have added a provision to this section that allows a brewer to request information on whether a formula is required in specific instances. Additionally we have amended this section to make it clear that TTB approval of a formula is required prior to using it to produce a fermented product.

Paragraph (a) of § 25.55 lists processes, materials, or specific types of fermented products that will require a brewer to file a formula. Paragraph (a)(1) contains the general rule to file a formula for a fermented product that is produced using certain processes. Based on the comments to Notice No. 4, which indicated that the term ''special processing'' is so broad that formulas would be required for most fermented products, we have changed the criteria in § 25.55(a)(1) that trigger filing a formula. Section 25.55(a)(1) now requires filing a formula for the use of any process, filtration, or other method of manufacture that is not generally recognized as a traditional process in the production of a fermented beverage designated as ''beer,'' ''ale,'' ''porter,'' ''stout,'' ''lager,'' or ''malt liquor.'' We have also removed the language from this proposed section that would have used a change in the character of beer or the removal of material from beer as a criterion for the filing of a formula since it is impossible to quantify these standards. Thus, under § 25.55(a)(1), the sole criterion for filing a formula for a process depends on whether or not the process is traditionally used in producing fermented products designated as beer, ale, and so forth.

Non-traditional processes such as ion exchange treatment, reverse osmosis, concentration of beer, separation of beer into different components, and filtration to substantially change the color, flavor, or character of beer are processes that require the filing of a formula. These processes are those specifically included in proposed § 25.55(a)(1) as requiring filing a formula. We note that these are only examples, and the exclusion of a process from this listing does not mean that its use in making a fermented product would not require the filing of a formula.

Conversely, processes such as pasteurization, filtration prior to bottling, filtration in lieu of pasteurization, centrifuging for clarity, lagering, carbonation, blending, and so forth are clearly traditional and their use does not require a formula. Subparagraph, (a)(1)(ii) of § 25.55 lists examples of these processes. These processes were listed in the preamble to Notice No. 4 as examples of traditional processes not requiring a formula. Other processes exist that are considered traditional and will not require filing a formula.

Subparagraph (a)(1)(iii) of § 25.55 provides that brewers may request a determination from us as to whether a particular process used in producing beer will require a formula. Procedures for requesting this determination are contained in new paragraph (f) of § 25.55.

Paragraphs 25.55(a)(2) through (a)(5) list the other instances when a formula is required to produce a fermented product. These correspond to those formula requirements in proposed § 25.55(a).

Paragraph (a)(3) requires brewers to file formulas when they use coloring or natural or artificial flavors in producing a fermented product. Paragraph (a)(4) requires brewers to file a formula for any fermented product to which fruit, fruit juice, fruit concentrate, herbs, spices, honey, maple syrup, or other food materials are added. In response to the above comments regarding the production of traditional brewery products to which certain flavors or other material are added without filing a statement of process, we have added a reference to § 25.55(f). This section permits brewers to request a determination from us as to whether a particular ingredient used in producing beer will require a formula.

3. New Procedural Requirements

New paragraph (f)(1) of § 25.55 authorizes TTB to determine whether the use of a particular process or a particular ingredient will require the filing of a formula. Under § 25.55(f)(2), a brewer may request a determination on whether the use of a proposed process or a proposed ingredient will require the filing of a formula. Paragraph (f)(2)(i) sets forth the information that a brewer must submit to TTB in order to request a determination as to whether a formula is required when using a particular process. For use of a proposed process, the brewer must submit a full description of the process, evidence of whether the process is generally recognized as a traditional process in the production of fermented beverages designated as beer, ale, and so forth, and an explanation of the intended effect of the process.

Similarly, a brewer may request an exemption from the formula filing

requirement under § 25.55(a)(3) and (a)(4) when certain flavors or other ingredients are used in a fermented product. Under § 25.55(f)(2)(ii), a brewer must submit information about the proposed ingredient, including a description of the ingredient, evidence establishing that the proposed ingredient is generally recognized as a traditional ingredient in the production of a fermented beverage designated as beer, ale, and so forth, and what effect the use of the proposed ingredient has on the fermented product. However, there is no exemption from the formula requirement in § 25.55(a)(2) with respect to the use of flavors and other ingredients containing alcohol, because this information is essential for purposes of administering the 51/49 standard.

As suggested by the comments, there may be many fermented beverages produced and marketed under the traditional designations of ''beer,'' ''ale,'' and so forth that contain flavors or other ingredients and which are produced without statements of process. The information submitted by brewers under paragraph (f) will allow us to evaluate whether or not these fermented products made with flavors or other ingredients should be subject to the formula approval and possible additional labeling provisions. TTB will give consideration to the past usage of those flavors or other ingredients and to whether the fermented products are considered to be traditional products that are entitled to be marketed as ''beer,'' ''ale,'' and so forth without formula approval and without additional labeling information. As part of our evaluation, we will take into consideration the class and type regulations in § 7.24(a) that require that statements of class and type conform to the designation of the product as known to the trade. Additionally, § 7.24(e) requires products designated as ''ale,'' ''porter''' or ''stout'' to be produced without the use of coloring or flavoring materials (other than those recognized in standard brewing practices). We will consider these criteria when evaluating a request for a determination on the use of flavors or other materials in producing fermented products without obtaining a formula approval.

With respect to the use of processes, we recognize that the listings in § 25.55(a)(1)(i) are not complete and that brewers may propose to use new processes in the production of fermented beverages. Thus, a request to TTB under paragraph (f) of § 25.55 will permit us to determine, for example, whether a process may constitute distillation, and whether a proposed process is appropriate for the production of a fermented beverage that is to be sold under a traditional designation such as ''beer'' or ''ale''.

We will maintain on the TTB Web site a list of new processes and ingredients determined by TTB under § 25.55(f) to require, or not to require, the filing of a formula.

B. Standards for Formula Approval

1. Comments Received

The FMBC and one FMB producer commented that proposed § 25.15(a) gives brewers a wide variety of ingredients for producing beer. The FMBC agreed that the statutory definition of beer permits the use of a wide range of fermentable materials at the brewery and that this listing of ingredients reflects existing TTB policy. However, both commenters stated that the proposed formula regulations provide no standard for using these materials in producing beer. The FMBC commented that proposed § 25.15(a) appears to blur the distinction between beer and wine since TTB taxes as wine products made primarily from honey, fruit, fruit juice, and fruit concentrate, which are all materials listed in proposed § 25.15(a). These commenters requested that TTB provide to the industry regulatory standards to as to when the use of honey, fruit, and other materials would result in classification of a product as a wine. As an example of a suggested standard, these commenters cited TTB's unofficial policy that half of the fermentable material in a beer must be derived from barley malt and other fermentable grains. These commenters suggested that incorporating this policy of ingredient use in the regulations would provide brewers with necessary guidance in determining what fermented products qualify as a beer, especially when other fermentable ingredients such as honey or fruit are used.

The FMBC further commented that although Notice No. 4 stated that one use of the formula submission is for TTB to evaluate whether a certain process constitutes distillation, the actual proposed formula regulations do not contain any standards that could be used for this purpose. The FMBC stated that without such regulatory guidelines, producers would be uncertain whether a proposed process constitutes distillation and, further, that this lack of a standard will lead to arbitrary and uneven decision-making. The FMBC therefore requested that TTB seek comments on proposed regulations containing both criteria for distillation and criteria that TTB will use in evaluating beer produced by special processes.

2. TTB Response

TTB has not incorporated in this final rule its informal administrative policy regarding the percentage of fermentable materials in a beer that must be grain-based because we did not air this issue for comment in Notice No. 4. However, we agree with the FMBC that the proposed regulatory text did not adequately distinguish between fermentable materials and fermentable adjuncts. The term ''beer'' is defined in section 5052(a) of the IRC as:

> beer, ale, porter, stout, and other similar fermented beverages (including saké or similar products) of any name or description containing one-half of 1 percent or more of alcohol by volume, brewed or produced from malt, wholly or in part, or from any substitute therefor.

In 1889, the Commissioner of Internal Revenue stated that the term ''substitute for malt'' included rice, grain of any kind other than malt, sugar, bran, glucose, and molasses.

The comment from the FMBC rightly pointed out that the proposed language of new § 25.15(a) seemed to authorize unlimited use of materials such as honey and fruit as substitutes for malt. This was not our intention. Accordingly, we have revised the language in paragraph (a) of proposed § 25.15. The first and second sentences of paragraph (a) address the basic brewing materials, and we have revised this list to conform the substitutes for malt to those specifically listed in the Internal Revenue Commissioner's letter in 1889. Accordingly, § 25.15(a) lists the following materials as the only permissible substitutes for malt: rice, grain of any kind, bran, glucose, sugar, and molasses. We note the term ''grain of any kind'' includes both malted and unmalted grains.

The third sentence of paragraph (a) lists other materials that may be used in brewing but that are not considered basic brewing ingredients as contemplated by the IRC. Extensive use of those other materials in fermentation could yield a fermented product that might be considered wine rather than beer; thus, the revised text distinguishes between those materials that we categorize as ''adjuncts'' and the basic brewing materials covered by the first two sentences of § 25.15(a).

In the absence of a regulatory standard, TTB will continue to rely on its current administrative guideline, which requires at least 50% of the fermentable material in an IRC ''beer'' to be one or more of the following: barley

malt, other malted grains, unmalted grains, rice, bran, sugars, or molasses. Brewers may use the other materials listed in the third sentence of § 25.15(a) as fermentable adjuncts in the production of a beer at a brewery. We will consider the comments summarized above as suggestions for future amendments of the part 25 regulations, and we may address this issue in the near future in connection with the planned revision of the part 25 brewery regulations.

With regard to the FMBC comment requesting regulatory standards for distillation and for the evaluation of other processes in producing beer, TTB notes that Notice No. 4 did not propose to adopt either of those standards. Moreover, determinations of whether distillation has occurred are highly technical matters. The determination often depends on laboratory examination of the process and the materials produced. Therefore, we believe that it is preferable to continue to examine processes on a case-by-case basis. However, we will consider these comments as suggestions for future regulatory amendments.

C. Alcohol Information in Formulas

1. Comment Received

One brewer commented that since Notice No. 4 proposed limits on the amount of alcohol that can be added to fermented beverages through the use of flavors and other ingredients containing alcohol, it was unnecessary to require detailed information about those ingredients in formula submissions. This commenter stated that since the proposal would limit the amount of added alcohol, the detailed information in proposed § 25.57 is not needed and should not be required.

Another brewer expressed its concern about the requirement to state maximum volumes of flavoring materials in formulas. This brewer commented that they need significant flexibility in the amounts and types of flavorings to accommodate price changes or acceptability of ingredients in foreign countries. Furthermore, they may use two or more flavors alternatively in a formulation. Although, on examination, the use of the maximum amounts of each flavor listed would appear to exceed overall added alcohol limitations, this brewer stated this is not the intention of using or listing alternative flavors in a formula. Thus, this brewer requested that TTB add a provision in § 25.57 specifying that the amount of alcohol contributed by all of the flavoring material in a formulation will not exceed the overall limit established by § 25.15.

This brewer also commented that the requirement to state the alcohol content of the fermented product at each step in production is overly restrictive. This requirement, according to the commenter, would eliminate streamlining of operations, forcing production by batches rather than in-line blending and other methods. The commenter therefore suggested requiring a single statement for alcohol content at the final stage of production.

2. TTB Response

TTB will continue to require information about individual flavors and other ingredients in fermented beverages, not only for tax classification purposes under the IRC, but also for labeling purposes under the FAA Act. Thus, we are retaining the requirement in § 25.57 to provide information about separate flavors and other ingredients. Additionally, we need to know at what stage in production flavorings are added since this information impacts the classification and labeling of the fermented product. Thus, we have amended § 25.57(a)(2) to require brewers to state the point of production'during, before, or after fermentation'that flavors are added.

We do agree that brewers need flexibility to use alternate ingredients in producing fermented beverages and that brewers should not be required to file new or amended formulas every time they make slight changes in the use of flavors or in the ratio of certain flavors used in a product. Nevertheless, we again emphasize that the proposed formula requirements are intended to clarify existing statement of process requirements and are not intended to impose new requirements on brewers.

It is our intention to permit the use of alternate or optional flavors in producing fermented products, and, to this end, we have added the following sentence at the end of proposed § 25.57(a)(1): ''You may include optional ingredients in a formula if they do not impact the labeling or identity of the finished product.'' We have also clarified our position on alcohol content contributed by alternative flavors and other nonbeverage ingredients containing alcohol in a formula by adding the following sentences at the end of § 25.57(a)(3)(iv): ''You are not required to list the alcohol contribution of individual flavors and other nonbeverage ingredients containing alcohol. You may state the total alcohol contribution from these ingredients to the finished product.'' We believe the addition of these sentences to § 25.57 will make it clear that the use of alternative ingredients is permitted and that it is not necessary to list the alcohol contribution of each individual ingredient in the formula.

We also have removed the proposed requirement in § 25.57(c) for listing in a formula the alcohol content of a fermented beverage at every step in production. We agree with the commenter that this requirement is burdensome and not useful in evaluating a formula. This paragraph now requires listing only the alcohol content of the fermented product after fermentation and the alcohol content of the finished product.

D. Reasonable Range of Ingredients

1. Comment Received

Only one commenter addressed TTB's request for comments on how to define a ''reasonable range'' of ingredients used in formulas in § 25.57(a)(1). This commenter, Diageo, recommended that TTB prescribe specific ranges for various ingredients. For ''major ingredients'' or those composing more than 3% of a product's total weight or volume, Diageo recommended that the range should vary by no more than 30% over or under the actual amount used in production. For ''minor'' ingredients that represent less than 3% of the product's weight or volume, this comment recommended the reasonable range could vary by up to 200% of the actual quantity used.

2. TTB Response

TTB is still seeking broad industry input on what constitutes a ''reasonable range'' of ingredients in a formula. Since only one commenter responded to this question, we do not believe we have enough information to take final rule action on its meaning. Thus, we are not defining ''reasonable range'' of ingredients for purposes of § 25.57(a)(1), and have removed the word ''reasonable'' from this provision.

TTB will continue to permit brewers who submit formulas to indicate a range of ingredients. A range of ingredients may not be so large as to change the tax classification of a fermented beverage or to change the designation of the fermented beverage. For example, a formula for a ''wheat beer'' cannot indicate a range of fermentable ingredients of 5 to 95% wheat malt since a minimum of 25% wheat malt is required for a beer to have this designation. We will evaluate formulas submitted by brewers, and make a case-by-case determination whether the range of ingredients indicated in a formula is appropriate. We note that,

under § 25.57(e), we will have authority to request additional information from brewers when we evaluate a formula.

We intend to revisit the question of what constitutes a ''reasonable'' range in the future through rulemaking or other appropriate procedure.

E. Formula Confidentiality

1. Comments Received

One brewer expressed a strong concern regarding the need for formula confidentiality. Another commenter stated that formula protection from public disclosure is a very important issue in the competitive market. Another brewer commented that the confidentiality issue for formulas should be resolved in the final rule as a separate regulation.

2. TTB Response

TTB agrees that formulas filed by brewers, like statements of process, are confidential and are not generally subject to public disclosure. To the extent that formulas are filed under the requirements of part 25, they are classified as ''return information'' subject to the disclosure restrictions of 26 U.S.C. 6103. Furthermore, formulas filed under either part 7 or part 25 are treated as confidential business information under the Freedom of Information Act, 5 U.S.C. 552(b)(4), and are thus exempt from that statute's mandatory disclosure provisions. Finally, TTB has always treated statements of process and formulas as trade secrets subject to the disclosure restrictions of 18 U.S.C. 1905.

At this time, TTB is not adopting the suggestion of the commenter who advocated placement of confidentiality provisions in the formula regulations in part 25 and part 7. At present, we believe that the existing TTB and Treasury disclosure regulations adequately address the protection of this type of data. Furthermore, it would not be an efficient use of government resources to address this issue for beer formulas, without addressing the similar issues presented by formulas for wine and distilled spirits products. Finally, before adopting such regulations, it would be preferable to specifically air the proposal for comments from the public and affected industry members. Notice No. 4 did not contain any such proposal.

Accordingly, TTB will consider these comments as suggestions for future rulemaking actions. In the interim, submitters of formulas required under parts 7 and 25 should accept our assurances that TTB will comply with all applicable statutory and regulatory restrictions on the disclosure of that proprietary information.

F. Standard Form for Formulas

1. Comments Received

Three commenters suggested that TTB should develop a standardized form for formulas and that industry members should be able to provide input on the development of the form. One brewer commented that TTB should develop a formula form for FMBs that is similar to the form used for flavored wine products. Another brewer requested that TTB develop a unique formula form that is unlike the formula form for wine.

2. TTB Response

At this time, TTB declines to adopt a standard formula form for part 25 purposes, but we will consider developing a standardized form for formulas in the future. We may consider combining a formula form for beer with the form used for wine in order to achieve standardization, and we will consider comments or suggestions from industry members and the public in developing any form for beer formulas. In the meantime, brewers may continue to prepare their formulas for fermented products on their own letterhead stationary.

G. Formula Proceedings

1. Comments Received

A brewer commented on the statement in § 25.55 that a formula remains in effect until surrendered or superseded by a new formula or until TTB cancels or revokes it. This commenter noted that no formal or informal procedure is given in the regulation that would apply to the cancellation or revocation of a formula. This commenter stated that any attempt to revoke a formula without proper procedures would raise serious due process issues. The commenter requested inclusion of those procedural safeguards and that they be at least similar to the procedural safeguards afforded certificate of label approval revocations.

2. TTB Response

In 1999, ATF issued regulations setting forth procedures for the revocation of approved labels in 27 CFR part 13, Labeling Proceedings. Although we have not prescribed specific procedures for the revocation of formulas in the regulations, it has been our policy to afford formula holders due process by giving them advance notice, and an opportunity to respond, before revoking the formula. An exception, of course, applies to the extent that the revocation is by operation of law or regulation. In those cases, it is the new law or regulation that requires the revocation of the formula, and TTB has no choice but to comply with the requirements of the law or regulation.

This issue was not specifically aired for comment in Notice No. 4. Accordingly, we are treating the single comment that we did receive on the issue as a suggestion for future rulemaking. Pending the issuance of regulations specifically addressing this issue, we will continue to provide due process to formula holders by applying procedures similar to those set forth in part 13 to any cancellation or revocation of an approved formula.

H. Placement in the CFR

1. Comments Received

One brewer noted that the proposed formula requirements appear in part 25, which applies to domestic beers, but not in part 7, which applies to all malt beverages. This brewer stated that the formula requirement should apply equally to domestic and imported products and should therefore be placed in part 7.

2. TTB Response

Placement of the formula requirement in part 25 is deliberate. This action implements TTB's existing statutory authority permitting it to request certain information from domestic brewers. Many domestic brewers do not operate in interstate commerce and do not obtain certificates of label approval for their products because they are not packaged but rather are sold from tanks at the tavern on brewery premises. The formula provisions must apply to these brewers as well as brewers who obtain certificates of label approval since the same requirements exist regarding the classification of fermented products and the appropriate use of ingredients. Thus, we must include the formula requirements in part 25 in order to apply them to all brewers, regardless of their size or the method of distribution of their products.

TTB has no statutory authority to require foreign producers to submit formulas. In the case of imported malt beverages, our authority to require formula information applies to U.S importers rather than to foreign brewers. Thus, this final rule document adopts the proposal to add a new paragraph to § 7.31 to reflect this authority. This provision recognizes TTB's authority to request formula or sample information from an importer in conjunction with the filing of a certificate of label approval for a malt beverage. We believe

we can obtain adequate information about an imported malt beverage under this new provision to determine the class and type of an imported malt beverage and to resolve any ingredient or labeling issues that may arise during a certificate of label approval submission.

XIII. Other Issues Raised by Commenters

A number of commenters raised issues regarding FMBs that were not directly addressed in Notice No. 4, and thus are outside the scope of this rulemaking document. However, TTB wishes to comment on some of these issues and may consider some of them to be appropriate for future rulemaking on beer or malt beverages.

A. Information Quality Act

1. Comment Received

A law firm representing a major FMB producer filed a request under the Information Quality Act (IQA) for correction of TTB's statement in Notice No. 4 that existing FMB labels may confuse and mislead consumers as to both the source and amount of alcohol in these beverages, arguing that Notice No. 4 did not provide any supporting data for these assertions. In response to this request, TTB stated that it would treat the letter as a comment to the proposed rule.

2. TTB Response

Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001, Public Law 106–554, directed the Office of Management and Budget (OMB) to issue, by September 30, 2001, government-wide guidelines that ''provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility and integrity of information (including statistical information) disseminated by Federal agencies.'' On September 28, 2001, OMB issued guidelines; revised final guidelines were published on February 22, 2002. (*See* 67 FR 8452.)

The law also requires Federal agencies to issue their own implementing guidelines, including administrative mechanisms that allow affected persons to seek and obtain correction of information maintained and disseminated by the agency, where such information does not comply with the OMB Guidelines. Finally, the law requires agencies to report periodically to OMB on the number and nature of complaints received by the agency, and how such complaints were handled.

In compliance with these requirements, both the Department of the Treasury and our predecessor agency, ATF, published guidelines on information quality. (See ''Subdivision of Treasury Information Technology (IT) Manual,'' Ch. 14: Information Quality (''Treasury Guidelines''), and ''Process for Requesting Correction of Information Disseminated by the Bureau of Alcohol, Tobacco and Firearms' (''ATF Guidelines'').) Both the Treasury and ATF Guidelines stress that the guidelines are not legally enforceable, and do not affect any otherwise available judicial review of agency action. Pursuant to the provisions of the Homeland Security Act of 2002, and Treasury Order No. 120–01 (Revised), published on January 24, 2003, ATF's orders still apply to TTB until superseded or revised. Accordingly, TTB continues to rely upon the published procedures of ATF, as well as the published procedures of the Department of the Treasury, in responding to requests for correction of information under the IQA.

Section 14.5.3(C) of the Treasury guidelines provides that in most cases, absent unusual circumstances, requests for correction of information contained in a notice of proposed rulemaking should be addressed through the rulemaking process. TTB found that there were no unusual circumstances in this case, and there was no evidence that the requester had a reasonable likelihood of suffering actual harm if the issue was not resolved before the issuance of the final rule on FMBs. Accordingly, we advised the requester that we would treat the letter as a comment on the proposed rule, and that the final rule would address the issues raised in the letter.

The issues raised by this comment are addressed elsewhere in this preamble. As we stated, TTB remains of the opinion that it is inherently misleading to label as FMBs products that derive up to 99% of their alcohol content from the distilled spirits components of added flavors and other nonbeverage products. As stated earlier in this preamble, we have determined that both the FAA Act and the IRC provide us with authority to define the terms ''malt beverage'' and ''beer'' in order to set limits on the use of alcohol from added flavors and in order to ensure that the majority of the alcohol is derived from fermentation at the brewery.

As already pointed out in this preamble, we have also concluded that we are not required to conduct consumer surveys every time we define a labeling term applicable to alcohol beverages. In this rulemaking proceeding, we have considered all the data presented by the commenters, including the consumer surveys previously conducted on this issue, as well as a new consumer survey submitted by another FMB producer. It is our conclusion that the evidence establishes that current labels may mislead consumers and that they do not provide adequate information about the identity of these products. As we specifically stated in this document, we are not concluding that FMB producers intentionally misled consumers; instead, these producers appear to have relied on the policies of TTB and its predecessor agencies in labeling and classifying these products.

However, we have also concluded that the term ''malt beverage'' may tend to mislead consumers when applied to a product deriving the majority of its alcohol content from the spirits components of added flavors and other nonbeverage ingredients. We have also concluded that such a term does not provide adequate information to consumers about the identity of such a product. Accordingly, the final rule limits use of the labeling term ''malt beverage'' to products that derive at least 51% of their alcohol content from fermentation at the brewery. We are confident that the data in support of the final rule comply with the requirements of the IQA.

B. ''Alcohol is Alcohol''

1. Comment Received

In its comment, the National Consumer League (NCL) stated, ''alcohol is alcohol, regardless of source.'' The NCL suggested that, from a consumer standpoint, only the actual alcohol content in a product matters and not the source of that alcohol. This commenter stated that most single servings of alcohol beverages contain roughly an equal amount of alcohol, a fact of which many consumers are unaware. Further, this commenter cited experts who agree that all types of alcohol beverages are functionally equivalent on a serving-to-serving basis and that no differences exist between hard liquor and beer.

Because of the ''alcohol is alcohol'' argument, NCL opposed the proposed rule because it perpetuates the differences between different types of alcohol beverages and would continue to accord alcohol beverages different regulatory status based on their source of alcohol. This commenter suggested there is no scientific or public policy to support these distinctions. As previously noted, NCL did state that there was greater merit to the majority standard, as it ''may reduce the

potential for consumers to be misled or confused,'' and that compliance with the majority standard ''will assure that consumers are not deceived as to product content.''

2. TTB Response

TTB acknowledges that, depending on the alcohol content of the product, single servings of different types of alcohol beverages may contain roughly the same amount of ethyl alcohol and that the ethyl alcohol found in these is chemically the same substance. However, longstanding Federal and State laws recognize very significant differences between distilled spirits, wine, and beer or malt beverages for production, tax, labeling, advertising, and distribution purposes. Thus, to the extent that the NCL comment suggests that Federal law should ignore these distinctions, it lies outside the scope of the proposals made in Notice No. 4 and would require significant statutory changes.

C. Marketing of FMBs to Underage Drinkers

1. Comments Received

A number of commenters, including many individuals and several public interest organizations, commented that FMBs should be treated as distilled spirits. These commenters claimed that FMBs are designed for the youth market due to their taste and the way in which they are marketed. Further, these commenters stated that the introduction of FMBs has substantially increased distilled spirits brand awareness and loyalty among young people. Some commenters claimed this is a deliberate strategy on the part of producers.

One commenter suggested that TTB should take action against producers and collect distilled spirits taxes on products marketed as malt beverages. CSPI requested that TTB classify FMBs as distilled spirits in order to reduce youth access to them by limiting the range of outlets where they can be sold. An individual commenter suggested that TTB undertake any action that would make FMBs more expensive in order to reduce their availability to underage youth.

CSPI further commented that its own data found that both teens and adults think that so-called ''alcopop'' products such as FMBs, which have the brand names of distilled spirits products, are more like liquor than beer or wine. Some commenters suggested that these products are particularly appealing to underage consumers and noted that these products are marketed on television and are widely available in convenience and grocery stores. Several commenters argued that convenience and grocery stores are more conducive to underage sales than are State-licensed retailers selling distilled spirits, and they supported classifying FMBs as distilled spirits products so that their distribution would be more strictly regulated in most States. Other commenters expressed various concerns about the public health consequences of alcohol abuse.

On the other hand, some commenters pointed to the recent study conducted by the Federal Trade Commission (FTC). (*See* ''Alcohol Marketing and Advertising: A Report to Congress,'' Sept. 2003.) The FTC's report noted that it had previously reviewed this issue in response to a complaint by CSPI, and it had found no evidence of intent to target minors with the FMB products, packaging, or advertising. Furthermore, after reviewing the consumer survey evidence submitted by CSPI in support of the proposition that FMBs were predominantly popular with minors, the FTC concluded that flaws in the survey's methodology limited the ability to draw conclusions from the survey data.

The FTC reviewed this issue again in response to a request by Congress to study the impact on underage consumers of the significant expansion of ads for flavored malt beverages. The FTC's investigation again found no evidence of targeting underage consumers in the marketing of FMBs. However, the report recognized that ad content that appeals to new legal drinkers, as well as the sweet taste of FMBs, may be attractive to minors, and the FTC urged the industry to exercise significant caution when introducing new alcohol beverage products, to ensure that they are not marketed to an underage audience. (*See* ''Alcohol Marketing and Advertising: A Report to Congress,'' September 2003, p.22.)

2. TTB Response

As stated in Notice No. 4, we do not believe that the use of distilled spirits brand names or cocktail names on FMB labels is inherently misleading. We recognize that many commenters believe that these names confuse consumers as to the identity of the products. However, if a product is clearly labeled with a designation such as ''malt beverage with natural flavors,'' we believe that the use of a distilled spirits brand name on the label does not mislead consumers. Accordingly, we are not adopting the suggestion that we prohibit the use of distilled spirits brand names or cocktail names in the labeling or advertising of FMBs. However, we will continue to consider labels and advertisements on a case-by-case basis, to determine if the overall presentation misleads consumers as to the identity of the product.

We note that not a single FMB producer indicated an intention to produce FMBs that would be classified as distilled spirits products under either the proposed 0.5% standard or the 51/49 standard we are adopting. Thus, under either standard, FMBs would continue to be produced as malt beverages rather than distilled spirits.

We recognize the concerns of many commenters that FMBs may be particularly attractive to young drinkers. The public health issue posed by underage consumption of alcohol beverages is significant. In September of 2003, the National Research Council and Institute of Medicine of the National Academies released a report to Congress on underage drinking, in which it found that the societal cost of underage drinking has been estimated at $53 billion, including $19 billion from traffic crashes and $29 billion from violent crime. (*See* ''Reducing Underage Drinking: A Collective Responsibility.'') The report calls for a comprehensive prevention strategy to create and sustain a broad societal commitment to reduce underage drinking.

TTB appreciates the importance of these prevention efforts. However, many of the issues that are of concern to the commenters in this regard are beyond the scope of our authority. For example, the FAA Act does not prohibit the advertisement of distilled spirits products on television; voluntary industry codes in the broadcasting and distilled spirits industries govern this matter. Furthermore, it is the States that decide whether products such as FMBs are sold in liquor stores or grocery stores. As previously noted, the rulemaking record indicates that producers of FMBs will reformulate their products so that they will continue to be classified as malt beverages under Federal law, regardless of whether we adopt the 0.5% standard or the 51/49 standard. Thus, we do not conclude that adoption of the 0.5% standard would result in the reclassification, under Federal law, of FMBs as distilled spirits products.

Our mandate is to ensure the proper classification of FMBs under the IRC and the FAA Act, and to ensure that these alcohol beverages are labeled and advertised in a manner that does not mislead consumers. We do not believe that the concerns of those commenters who wish to reduce underage alcohol consumption, important as they are, are directly addressed by this rulemaking.

D. More Explicit Labeling of FMBs

1. Comments Received

Several commenters requested that TTB implement more specific labeling for FMBs, including label items such as calories, serving size, ingredients, alcohol content, and so forth. These commenters claimed this action would provide essential information to consumers regarding these products.

2. TTB Response

TTB believes that these comments are outside the scope of the current rulemaking, as we did not specifically solicit comments on these issues in Notice No. 4. However, the CSPI, the NCL, and other public interest groups have recently petitioned TTB to require additional labeling of all alcohol beverages. TTB will separately study the petition in order to determine whether to propose such labeling for alcohol beverages. Therefore, TTB is not considering this request for additional labeling of flavored malt beverages as part of this rulemaking.

E. Establishing Another Category of Alcohol Beverages

1. Comments Received

Some commenters suggested that, instead of attempting to classify FMBs as either beer or distilled spirits, TTB should seek an amendment to Federal law to define a new class of alcohol beverages. These commenters suggested that with a new category of alcohol beverages, TTB could better address taxation, labeling, and other issues that apply to FMBs. This suggestion would establish a unique category of alcohol beverages unlike distilled spirits or traditional beer.

2. TTB Response

This comment is beyond the scope of the current rulemaking procedure, as its implementation would require amendments to Federal law.

F. Other Comments

One commenter suggested that TTB require identification and labeling of the source of alcohol in FMBs in order to inform consumers of their composition.

TTB believes that this comment is outside the scope of the proposals contained in Notice No. 4. Accordingly, we are not addressing this subject in the final rule.

XIV. Implementation Dates

TTB received 20 comments expressing opinions about implementation dates, and related tax issues, for adoption of either the 0.5 percent standard or the majority standard for flavored malt beverages. Among these comments, 6 were from brewers, 3 were from Members of Congress, 2 were from State licensing agencies, 3 were from national brewery trade associations, and the rest were from individuals.

A. Effective Date for Compliance With the New Added Alcohol Standard

1. Comments Received

Comments concerning implementation, or a regulatory effective date, varied from a minimum of ''as short a period as is reasonable'' to a maximum of two years after publication of the final rule containing an added alcohol standard for FMBs.

All brewers that commented on this issue expressed concerns regarding the time needed for reformulating products, and for the purchase, installation, and testing of new equipment. Among the reasons presented for establishing a longer effective date were: the need to develop the correct taste profile in a reformulated product; the need to invest and install new equipment to produce reformulated FMBs; the time needed to gear up for mass production of reformulated products; the time required to invest in co-packers equipment; and the need to test new formulations of FMBs. One brewer stated that reformulation of their products would require them to produce as much as 8 times the amount of fermented malt base and that they would require significant time to procure the necessary equipment. Another brewer commented that they would be able to comply with a 0.5% alcohol standard, as proposed, within 3 months time, and requested, at most, a 6-month delayed effective date. Six brewers requested effective dates of 6 months, 6 to 9 months, 1 year (two comments), 18 months, and 2 years.

Three trade associations commented on this issue. One brewery trade association commented that 3 months was an adequate amount of time to comply with the new standard. Another commented that 18 months would be required. The third, a wholesaler association, requested that TTB establish a reasonable amount of time for brewers to comply with the new standard.

One State regulatory authority requested swift action to re-classify FMBs to the 0.5 percent standard, specifying that a TTB delay will force them to initiate a more restrictive regulation for alcohol beverages. Another State believed it would not need new State legislation for the 0.5 percent standard, and urged TTB to adopt this standard in the minimum period needed to assure industry compliance.

2. TTB Response

TTB is sensitive to the time needs and excise tax concerns of the FMB industry during this period of transition. We realize that adoption of any added alcohol standard will impact production methods, ingredients, suppliers, costs, and other facets of the business. Moreover, we recognize that considerable time is needed to develop new products that not only conform to an added alcohol standard, but which taste the same or are similar to existing non-conforming FMBs.

Based on the submitted comments and the considerations noted above, we are prescribing a one-year delayed effective date for the regulatory changes adopted in this final rule document. We believe this will allow ample time to develop new products and to acquire the necessary equipment to place them into production. We believe the three-month and six-month periods requested by two commenters are too short for some industry members to make the necessary transition to the new rules. We also believe that industry members will be able to comply with the new rules in considerably less time than the 2-year period requested by one commenter, especially since we are adopting the less stringent 51/49 standard for FMB products.

In adopting a one-year delayed effective date, we also note that, due to the complex nature of this rulemaking, more than one year has already passed since the publication of the proposed rule. Thus, brewers have already had a substantial period of time to focus on the research and development necessary to bring their products into compliance with a new standard.

Accordingly, we provide a one-year period of time from publication of this final rule in the **Federal Register** for brewers and importers to comply with the 51/49 standard as well as other new regulatory requirements. As of the effective date of this final rule, products that do not comply with the new 51/49 standard may not be produced at a brewery, bottled at a brewery, removed from a brewery with or without the payment of tax, removed from customs custody for consumption, or (in the case of products not destined for exportation) transferred to a second customs bonded warehouse.

B. Effect on Products in the Marketplace

1. Comments Received

Three brewers and two trade associations commented about FMBs that are in the marketplace at the time of the effective date of a new standard. These commenters sought reassurance that these FMBs would not be subject to a floor stocks tax at the higher distilled spirits excise tax rate, and that these products would not be subject to destruction or recall from the market since they might be considered distilled spirits at that time. One brewer requested a six-month delay from the final rule's effective date so that wholesalers could deplete their inventories of FMBs not in conformity with new alcohol standards.

2. TTB Response

As noted above, the effective date for implementation of the alcohol standard impacts only the production and removal from a brewery, or the importation and removal from customs custody of malt beverage or beer products. Thus, TTB will continue to treat as beer or malt beverages those products made according to previously existing standards and removed from the brewery or from customs custody before the effective date. TTB will not assess a distilled spirits tax on them or require their recall or destruction. Wholesalers and retailers holding these products on or after the effective date may continue to market them in the same manner as prior to the effective date, until their supplies in the marketplace are exhausted.

Notwithstanding the above, it is incumbent on wholesalers and retailers who hold these products to ensure compliance with the requirements of the States in which the products are held or introduced for sale. Many States have requested that TTB provide a Federal FMB definition and added alcohol percent standard that can serve as a guide for State classification of alcohol beverages. In adopting a 51/49 standard for malt beverages containing no more than 6% alcohol by volume, and by adding to the regulations a 1.5% standard for malt beverages with an alcohol content in excess of 6% as explained later in this preamble, TTB is furnishing guidelines to the various States concerning the classification of flavored malt beverages. As already noted in this preamble, while most States look to Federal guidance in this area and rely on Federal classification of alcohol beverages, there is certainly no requirement for them to do so. Thus, individual States may take a different view of the classification and taxable status of these products, and may reclassify FMBs as distilled spirits products, perhaps even before the effective date of this final rule.

C. Additional TTB Comment on the Effective Date

We are using a single effective date for the new alcohol percent standards for FMBs. This date will permit affected industry members to transition their product lines according to their own needs. Until the effective date of this final rule, industry members may continue to produce and remove, at the beer tax rate, FMBs that do not meet the new alcohol percent standards.

Producers who cannot comply with the new 51/49 standard as of the effective date of the final rule must stop producing those FMB products at a brewery. As of the effective date of the final rule, products deriving more than 49% of their alcohol content from the distilled spirits components of added flavors may only be produced at distilled spirits plants. Such products would of course be subject to tax at the appropriate distilled spirits excise tax rate.

Until the effective date of the final rule, TTB's Advertising, Labeling and Formulation Division (ALFD) will continue to approve statements of process and certificates of label approval (COLAs) for FMBs that may not comply with the new added alcohol standards. During this interim period, ALFD will qualify these statements of process and COLA approvals with reference to this final rule's effective date. However, whether qualified or not, statements of process for FMBs not in compliance (including those permitting you to make a product not in compliance with the 51/49 standard) will become obsolete as of the effective date of this final rule and will be revoked by operation of the regulation. This means that no individual proceedings are necessary in order to revoke those formulas. Similarly, whether qualified or not, COLAs for these products that do not comply with the 51/49 standard as of the effective date will also be considered revoked by operation of regulation unless the underlying statement of process is superseded by a new formula that is in compliance with the 51/49 standard.

Because this final rule incorporates, in large part, the holdings of ATF Rulings 96–1 and 2002–2, while establishing new standards for added alcohol from flavors and other nonbeverage products, these rulings will become obsolete as of the effective date of the final rule.

XV. Comments on the Proposed Regulatory Text; Regulatory Text Changes

Several commenters suggested changes to the proposed regulatory text amendments contained in Notice No. 4. These comments are not directed to the policy behind the proposed regulatory amendments, but rather to their wording, clarity, or organization. In addition, TTB has independently reviewed the texts of the proposed amendments and has made a number of changes as a result of that review. The comments submitted and the changes made that are not of a minor editorial nature are discussed below.

A. Reference to Malt Beverage Standards, §§ 7.10 and 7.11

1. Comment Received

The FMBC commented that creating a new section to include standards for malt beverages is unnecessary because persons seeking information on this topic would look at the definition of a malt beverage in § 7.10. The FMBC suggested incorporating the standards proposed in § 7.11 into the definition of malt beverage appearing in § 7.10.

2. TTB Response

TTB does not agree with the comment and suggested text change. The statutory definition of a malt beverage is not affected by this final rule; that definition cannot change without legislative action. Standards applying to production or composition of a malt beverage are more technical and may change from time to time. We wish to separate the relatively simple statutory definition from the more technical production requirements that we are adopting in this final rule. Further, we note that § 7.10 would become unnecessarily long and technical if we were to place malt beverage standards in that section. Therefore, we have decided to place the standards applying to production and composition of malt beverages in § 7.11.

We have provided a cross reference in § 7.10 to the standards for malt beverages appearing in § 7.11 in order to alert readers that additional conditions may apply to the production or composition of malt beverages. We also have changed proposed § 7.10 by including a reference to ''processes'' as well as standards for flavors in order to alert the reader to the fact that malt beverages may undergo certain processing specified in § 7.11.

TTB has changed the heading of § 7.11 to read ''Use of ingredients containing alcohol in malt beverages; processing of malt beverages.'' We

believe this title more accurately reflects the provisions of this section, which permit the use of certain processes and authorize the use of certain ingredients containing alcohol in malt beverages.

B. Comments on Alcohol Flavoring Material Reference, §§ 7.11 and 25.15

1. Comments Received

The FMBC commented on the wording in proposed § 7.11, specifically the phrase ''alcohol flavoring materials and other ingredients containing alcohol.'' The FMBC supported this wording, and suggested that this language recognized that brewers may add other ingredients containing alcohol, such as taxpaid distilled spirits and wine, to malt beverages. This commenter suggested that the final rule further clarify this policy by authorizing the use of ''alcohol flavors, taxpaid wine, taxpaid distilled spirits, or any other ingredient containing alcohol'' in both § 7.11 and § 25.15.

2. TTB Response

TTB used the wording ''alcohol flavoring materials and other ingredients containing alcohol'' in proposed § 7.11 to describe the kinds of materials that might contribute alcohol to a finished malt beverage. We do not agree with this commenter's suggestion that this language includes, or should be extended to include, the use of taxpaid distilled spirits or taxpaid wine.

The provision allowing the addition of flavors and other ingredients containing alcohol to malt beverages was specifically designed to permit the addition of alcohol flavors to malt beverages and to allow the addition of certain other materials such as blenders containing alcohol to malt beverages. TTB in Notice No. 4 did not intend to authorize the direct addition of distilled spirits to malt beverages. TTB reaffirms its long-held position that the IRC does not explicitly authorize the direct addition of distilled spirits to malt beverages. Thus, this final rule will not authorize the addition of distilled spirits to malt beverages.

TTB did include a reference to taxpaid wine in proposed § 25.15(b) and in proposed § 25.55(a)(2). However, this final rule does not authorize that use of taxpaid wine.

Like distilled spirits, taxpaid wine is a beverage product. Neither the IRC nor the FAA Act specifically authorizes the use of taxpaid wine in the production of malt beverages. TTB will not allow taxpaid wine to make up to 49% of the alcohol content of a malt beverage. Thus, this final rule does not authorize the use of taxpaid wine in any malt beverage.

Accordingly, in this final rule we have clarified our intent regarding the use of ingredients containing alcohol by using the phrase ''flavors and other nonbeverage ingredients containing alcohol'' in §§ 7.11 and 25.15. Use of this modified language makes it very clear that flavoring materials may contain alcohol and that other nonbeverage ingredients such as blenders may contain alcohol. It does not authorize the use of taxpaid distilled spirits or taxpaid wine in the production of malt beverages.

TTB notes that the FMBC also supported the Notice No. 4 recognition that various processes and treatments may be used on malt beverages to remove color, aroma, bitterness or other characteristics derived from fermentation. This provision remains unchanged in § 7.11.

C. Malt Beverages Above 6.0% Alc/Vol; Status of ATF Ruling 96–1

1. Comments Received

The FMBC commented that ATF Ruling 96–1 limits the contribution of added alcohol in malt beverages over 6.0% alc/vol to not more than 1.5% of the total volume. This commenter stated that Notice No. 4 neither incorporated nor addressed this limitation and requested that TTB clarify the status of the limit in the ruling on alcohol addition for malt beverages over 6.0% alc/vol.

Coors commented that the practical effect of the proposed 0.5% added alcohol limitation is to establish a natural limitation on the [upper] alcohol content of malt beverages. This commenter noted that the TTB alternative 51/49 percent proposal would permit a brewer to produce a 35% alc/vol malt beverage by combining a high alcohol fermented malt beverage of 18% alc/vol with an additional 17% alc/vol through alcohol flavor and blender use. Coors stated that ATF Ruling 96–1 clearly presented TTB's intention that alcohol in malt beverages should be derived from fermentation and not from fortification.

2. TTB Response

Notice No. 4 proposed to limit the addition of alcohol to all malt beverages from flavors and other materials containing alcohol to less than 0.5% alc/vol. This proposal would have included malt beverages with an alcohol content exceeding 6% alcohol by volume. Thus, there was no need to separately address these malt beverages in the proposed regulations.

As stated above, we have decided to adopt the more liberal 51/49 standard instead of the proposed 0.5% standard. However, Coors has accurately pointed out one hazard of extending the 51/49% majority rule to malt beverages of any alcohol strength including those over 6% alc/vol. To do so would facilitate the production of extremely high strength malt beverages at breweries.

Prior to issuing ATF Ruling 96–1, our predecessor agency reviewed FMBs on the market and determined that, based on approved statements of process, the only FMBs containing a significant amount of alcohol derived from flavors were for products that contained 6% or less alcohol by volume in the finished product. Although ATF had approved statements of process under § 25.67 for FMBs containing in excess of 6% alcohol by volume, in no instance had the quantitative amount of alcoholic flavoring materials used in such products contributed more than 1.5% alc/vol to the finished product. Accordingly, to preserve the status quo pending rulemaking on this issue, ATF ruled that FMBs containing in excess of 6% alcohol by volume may derive no more than 1.5% alcohol by volume from added alcoholic flavoring materials.

Based on the rulemaking record, there is no need to liberalize the added alcohol standard for FMBs with an alcohol content in excess of 6%. TTB believes that any such liberalization would raise serious questions as to whether the finished product was appropriately classified as a malt beverage or as a distilled spirits product.

Accordingly, this final rule incorporates the terms of ATF Ruling 96–1 with respect to malt beverages with an alcohol content of more than 6% alc/vol, by restricting the addition of alcohol to malt beverages above 6.0% alc/vol to not more than 1.5% of the volume of the finished product. We have incorporated this policy in the regulatory texts by adding a new paragraph (a)(2) to § 7.11 and by modifying § 25.15(b) to include the same 1.5% added alcohol qualification for malt beverages and beer over 6% alc/vol.

D. Changes to § 7.31

Although there is no substantive change in the proposed amendment to § 7.31, we have reversed the order of existing paragraph (d) and proposed new paragraph (e), so that paragraph (d) contains the new provision for submitting a formula or sample of a malt beverage to TTB in conjunction with the filing of an application for a certificate of label approval. We have also changed the term ''you'' to ''importer'' to clarify

the person required to comply with the regulation.

E. Reference to Standards for Beer, §§ 25.11 and 25.15

1. Comment Received

The FMBC commented that creating a new § 25.15 to include standards for beer production is unnecessary because persons seeking this information would look at the definition of beer in § 25.11. The FMBC therefore suggested incorporating the proposed § 25.15 standards into the existing definition of beer in § 25.11.

2. TTB Response

TTB is not adopting this suggestion for the reasons previously set forth in this comment discussion. We wish to separate the relatively simple statutory definition of beer from the more technical production requirements that we are adopting in this final rule. Further, we note that § 25.11 would become unnecessarily long and technical if we were to include standards for beer in that section. Therefore, we have retained the proposed standards applying to the production and composition of beer in new § 25.15.

We believe that the inclusion of a cross reference at the end of the § 25.11 beer definition to the standards for beer appearing in § 25.15 is sufficient to alert readers that additional conditions may apply to the production and composition of beer.

F. Other § 25.15 Issues

We have changed the title of § 25.15 to read, ''Materials for the production of beer.'' This change better reflects the content since this section specifies materials that may be used in producing beer at a brewery, and does not refer to the tax on beer.

G. Comments on Formula Proposals, §§ 25.55–25.58

We have conformed the language throughout §§ 25.55–25.58 to the use of the phrase ''flavors and other nonbeverage ingredients containing alcohol'' in referring to the materials containing alcohol that may be used in producing beer. We have also removed the term ''taxpaid wine'' that appeared in proposed §§ 25.55(a)(2) and 25.57(a)(3)(ii). As noted earlier in this comment discussion, these formula regulations do not authorize the use of taxpaid wine or taxpaid distilled spirits in the production of beer. We also added exception language regarding hop extract in § 25.55(a)(2) to clarify that the use of hop extract containing alcohol does not require the filing of a formula.

It has been TTB's policy to authorize the use of a formula covering production of a beer base that the brewer does not intend to market, but will use in the eventual production of a product such as an FMB. For example, a brewer might choose to file a formula for a beer base that the brewer has produced and removed character from through a variety of processes. At a later stage, the brewer could produce several distinct fermented products by adding different flavors to this base. We have added a new paragraph (b)(2) to § 25.55 to reflect this practice.

If a brewer adds flavors to a beer base or otherwise treats it to produce a fermented beverage that the brewer intends to market, any approved beer base formula should be referenced in the formula information specified in § 25.57. We have added a new paragraph (d) to § 25.57 to clarify this point.

Although we did not receive comments directed to § 25.58, we have reorganized and revised this section in order to clarify the distinction between a new formula and a superseding formula. We have not changed the substantive requirements in proposed § 25.58.

Paragraph (a) sets forth conditions that trigger the filing of a new formula, and these conditions are the same as those in paragraphs (a)(1) through (a)(6) of proposed § 25.58. The revised introductory text of paragraph (a) merely incorporates the terms of proposed paragraph (c) regarding giving each new formula a new formula number.

Paragraph (b) of § 25.58 combines proposed paragraphs (b) and (d). The introductory text of revised paragraph (b) clarifies when a brewer may file a superseding formula in lieu of filing an entirely new formula. Under this text, a brewer may file a superseding formula when the brewer makes a change to an existing approved formula that is not of a type that would require a holder of a certificate of label approval to file a new application for label approval on TTB Form 5100.31, regardless of whether the formula is for a product covered by a certificate of label approval. Thus, when a brewer replaces one ingredient with a similar ingredient, and this replacement is not of a type that would require a new certificate of label approval for the product, the brewer may file a superseding formula rather than a new formula.

Paragraph (b)(1) specifies that superseding formulas must be approved by TTB before they may be used, and that TTB will cancel the original formula upon approval of the superseding formula. Under § 25.58(b)(2), a superseding formula retains the original formula number but it must be annotated to show it is a superseding formula. If an existing certificate of label approval covers the product, the brewer may continue to use that certificate.

We have changed the section headings in §§ 25.15 and 25.53 through 25.58 by changing the question-style headings to declarative statement headings. We believe the latter approach is more effective than question-style headings in helping the reader to find regulatory information. Additionally, we note that part 25 does not contain other question-style headings at this time.

XVI. Regulatory Analysis and Notices

A. Executive Order 12866

As noted in the comment discussion in this final rule, several commenters suggested that the proposed 0.5% standard would impose significant regulatory burdens and economic costs on the FMB industry. One comment in particular, from the FMBC, suggested that the costs of the proposed 0.5% standard, when extrapolated to the entire FMB industry, would exceed $600 million over the next 4 years. In addition, this commenter suggested that the proposed 0.5% standard would have a negative impact on revenue collections by the Federal government due to reductions in sales of FMBs.

TTB believes that the FMBC comment may have overstated the regulatory burdens and economic costs that would be imposed by the proposed rule. However, as already pointed out in this document, we are persuaded by this and other comments that imposition of a 0.5% standard for all FMBs would impose greater regulatory burdens and economic costs than the 51/49 standard.

In response to these comments, TTB evaluated several options to minimize the regulatory burdens and economic costs imposed by the rule. In particular, we adopted an option that we believe will meet the important regulatory goals of this rulemaking project, while reducing in a meaningful fashion the regulatory burdens and costs imposed by the rule. In other words, we adopted the more lenient alternative advocated by the FMBC and others who opposed the 0.5% rule; thus, the final rule allows products labeled as FMBs to derive up to 49% of their alcohol content from the distilled spirits components of added flavors and other nonbeverage products.

In response to concerns raised by the comments, TTB also adopted a one-year delayed effective date for the final rule,

to allow affected producers adequate time to reformulate their products, if necessary. We believe that this delayed effective date also serves to address the concerns of affected industry members.

Accordingly, for the reasons set forth above, we have determined that the final rule, as modified in response to the comments, is not a significant regulatory action as defined in E.O. 12866. Therefore, a regulatory assessment is not required.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions.

We have determined that this final rule will not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not required.

In Notice No. 4, we stated our belief that 10 or fewer qualified small breweries actually manufacture flavored malt beverages subject to this rule. We specifically solicited comments on the number of small breweries that may be affected by this rule and on the impact of this rule on those breweries. We asked small breweries that believe they would be significantly affected by this rule to let us know and to tell us how the rule would affect them.

In response to Notice No. 4, we received only a few comments from brewers that identified themselves as small brewers that would be affected by the rule. These comments, as well as other comments submitted by FMB producers, suggested that the proposed 0.5% standard would unfairly burden small brewers, and could result in putting these companies out of business. The comments indicated that the small brewers would be able to comply with the 51/49 standard without such significant adverse consequences.

In response to these comments and others, we have modified the regulatory texts contained in this final rule to reduce the potential economic impact of the rule on small businesses that produce FMBs. As indicated earlier in the preamble to this document, we considered several options to reduce the economic impact on small businesses.

For various reasons, most importantly because the pertinent statutes would not authorize such an option, we rejected the option of exempting small businesses from compliance with the requirements of the final rule. However, for a number of reasons explained in detail earlier in the preamble to this document, we have adopted the more liberal 51/49 standard for products labeled as FMBs. We have also adopted a one-year delayed effective date for the provisions of this final rule, to allow adequate time for those FMB producers that wish to reformulate their products or otherwise conform to the requirements of the final rule regulatory texts. Accordingly, we believe that we have responded to the concerns raised by small businesses and have meaningfully reduced the costs and regulatory burdens imposed by the rule.

It should be noted that several small wholesalers and retailers commented that the proposed rule would have an adverse impact on them, because State law might not allow them to sell FMB products that are reclassified as distilled spirits products. We believe that the modifications discussed above address their concerns. Furthermore, the FMB producers that commented on this issue all indicated an intention to reformulate their products within the requirements of the final rule, rather than produce beverages that would be classified as distilled spirits products under Federal law. Finally, we would note that the Regulatory Flexibility Act does not require us to consider indirect effects on businesses that are not directly subject to the requirements of the final rule; instead, the relevant economic impact is ''the impact of compliance with the proposed rule on regulated small entities.'' *Mid-Tex Electric Cooperative, Inc.* v. *FERC*, 773 F.2d 327, 342 (D.C. Cir. 1985). Wholesalers and retailers of FMBs are not directly subject to the requirements of the final rule.

Finally, a comment from the FMBC suggested that the alcohol content labeling requirement would have a significant economic impact on a substantial number of small entities, including many small brewers that produce beers and ales that contain only a small quantity of flavors. The FMBC comment conceded that it did not know how many brewers might be impacted by this requirement but suggested that many small brewers would be affected. The FMBC stated that its members already label their FMB products with alcohol content statements.

TTB did not receive any comments from small brewers who produce traditional flavored beers and ales suggesting that the requirement for an alcohol content statement would impose a significant economic burden. The Brewer's Association of America, a trade association representing more than 1,400 small brewers, supported the proposed rule without mentioning the alcohol content statement requirement. Furthermore, we note that brewers are already required to keep records of alcohol content under the IRC regulations set forth in 27 CFR 25.293. We have no information indicating that the requirement to disclose alcohol content on brand labels for malt beverages deriving alcohol from added flavors or other nonbeverage ingredients would impose a significant economic burden on a substantial number of small entities. Accordingly, the record does not support such a finding.

Pursuant to section 7805(f) of the Internal Revenue Code of 1986, we submitted the notice of proposed rulemaking preceding this final rule to the Chief Counsel for Advocacy of the Small Business Administration (SBA) for comment on its impact on small businesses. We received no comment from the SBA in response to that submission.

C. Paperwork Reduction Act

In Notice No. 4, TTB stated that the provisions of the Paperwork Reduction Act of 1995, 44 U.S.C. chapter 35, and its implementing regulations, 5 CFR part 1320, did not apply to the notice of proposed rulemaking, because we were not proposing any new or revised recordkeeping requirements. After review of the comments on this issue, TTB has determined that the final rule includes a new reporting requirement and a revision of an existing reporting requirement. The new reporting requirement involves the specific detail that must be included in the formulas for certain fermented products produced at a brewery. The revision involves the mandatory alcohol content statement for malt beverages that derive alcohol from added flavors or other ingredients. Because the final rule does not take effect for one year from publication of this document in the **Federal Register**, there is time to air these requirements for public comment prior to the effective date of the rule.

These collections of information have been reviewed and, pending receipt and evaluation of public comments, approved by the Office of Management and Budget (OMB) under 44 U.S.C. 3507(j) and assigned control numbers 1513–0118 and 1513–0087. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by OMB.

The collection of information in this regulation covered by OMB control

number 1513–0118 is found in §§ 25.55–25.58. This collection is necessary to ensure that producers of certain beers provide enough information to TTB to ensure the proper tax classification of the products. The likely respondents are businesses.

• *Estimated total annual reporting and/or recordkeeping burden:* 500 hours.

• *Estimated average annual burden hours per respondent and/or recordkeeper:* 5 hours.

• *Estimated number of respondents and/or recordkeepers:* 100.

• *Estimated annual frequency of responses:* 5.

The collection of information in this regulation covered by OMB control number 1513–0087 is in § 7.22, which imposes a requirement for an alcohol content statement on labels of malt beverages deriving any alcohol from added flavors or other nonbeverage ingredients. This information is required to ensure that consumers are not misled as to the alcohol content of malt beverages that derive alcohol from sources other than fermentation at a brewery. The likely respondents are businesses. This information constitutes one element of the labeling information on alcohol beverages required under authority of the Federal Alcohol Administration Act (FAA Act), and it relates to only one sector of the alcohol beverage industry. The policy of TTB and its predecessor agency has been to treat all labeling requirements under the FAA Act as resulting in one burden hour per respondent. Accordingly, because the producers of malt beverages already know the alcohol content of their products and displaying that content on the label constitutes only a small portion of the existing labeling requirements, the burden estimate associated with this alcohol content labeling requirement is minimal.

Comments concerning each collection of information should be directed to the Office of Management and Budget, Attention: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503. A copy should also be sent to the Chief, Regulations and Procedures Division, Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street, NW., Washington, DC 20220. Any such comments should be submitted not later than March 4, 2005. Comments are invited on:

• Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

• The accuracy of the agency's estimate of the information collection burden;

• Ways to enhance the quality, utility, and clarity of the information to be collected;

• Ways to minimize the information collection burden on respondents, including through the use of automated collection techniques or other forms of information technology; and

• Estimates of capital or start up costs and costs of operations, maintenance, and purchase of services to provide information.

XVII. Drafting Information

This principal author of this document is Charles N. Bacon. Other personnel in the Alcohol and Tobacco Tax and Trade Bureau and in the Department of the Treasury participated in the drafting of the document.

List of Subjects

27 CFR Part 7

Advertising, Authority delegations, Beer, Consumer protection, Customs duties and inspection, Imports, Labeling, Packaging and containers, Reporting and recordkeeping requirements.

27 CFR Part 25

Beer, Claims, Electronic fund transfers, Excise taxes, Exports, Labeling, Liquors, Packaging and containers, Reporting and recordkeeping requirements, Research, Surety bonds.

Amendment to the Regulations

■ For the reasons discussed in the preamble, TTB amends 27 CFR parts 7 and 25 as follows:

PART 7—LABELING AND ADVERTISING OF MALT BEVERAGES

■ 1. The authority citation for 27 CFR part 7 continues to read as follows:

Authority: 27 U.S.C. 205.

■ 2. We amend § 7.10 by revising the definition of ''malt beverage'' to read as follows:

§ 7.10 Meaning of terms.

* * * * *

Malt beverage. A beverage made by the alcoholic fermentation of an infusion or decoction, or combination of both, in potable brewing water, of malted barley with hops, or their parts, or their products, and with or without other malted cereals, and with or without the addition of unmalted or prepared cereals, other carbohydrates or products prepared therefrom, and with or without the addition of carbon dioxide, and with or without other wholesome products suitable for human food consumption. Standards applying to the use of processing methods and flavors in malt beverage production appear in § 7.11.

* * * * *

■ 3. We amend subpart B by adding a new § 7.11 to read as follows:

§ 7.11 Use of ingredients containing alcohol in malt beverages; processing of malt beverages.

(a) *Use of flavors and other nonbeverage ingredients containing alcohol—*

(1) *General.* Flavors and other nonbeverage ingredients containing alcohol may be used in producing a malt beverage. Except as provided in paragraph (a)(2) of this section, no more than 49% of the overall alcohol content of the finished product may be derived from the addition of flavors and other nonbeverage ingredients containing alcohol. For example, a finished malt beverage that contains 5.0% alcohol by volume must derive a minimum of 2.55% alcohol by volume from the fermentation of barley malt and other materials and may derive not more than 2.45% alcohol by volume from the addition of flavors and other nonbeverage ingredients containing alcohol.

(2) In the case of malt beverages with an alcohol content of more than 6% by volume, no more than 1.5% of the volume of the malt beverage may consist of alcohol derived from added flavors and other nonbeverage ingredients containing alcohol.

(b) *Processing.* Malt beverages may be filtered or otherwise processed in order to remove color, taste, aroma, bitterness, or other characteristics derived from fermentation.

■ 4. We amend § 7.22 by adding a new paragraph (a)(5) to read as follows:

§ 7.22 Mandatory label information.

* * * * *

(a) * * *

(5) Alcohol content in accordance with § 7.71, for malt beverages that contain any alcohol derived from added flavors or other added nonbeverage ingredients (other than hops extract) containing alcohol.

* * * * *

■ 5. We amend § 7.29 by revising the introductory text of paragraph (a) and by adding a new paragraph (a)(7) to read as follows:

§ 7.29 Prohibited practices.

(a) *Statements on labels.* Containers of malt beverages, or any labels on such

containers, or any carton, case, or individual covering of such containers, used for sale at retail, or any written, printed, graphic, or other material accompanying such containers to the consumer, must not contain:

* * * * *

(7) Any statement, design, device, or representation that tends to create a false or misleading impression that the malt beverage contains distilled spirits or is a distilled spirits product. This paragraph does not prohibit the following on malt beverage labels:

(i) A truthful and accurate statement of alcohol content, in conformity with § 7.71;

(ii) The use of a brand name of a distilled spirits product as a malt beverage brand name, provided that the overall label does not present a misleading impression about the identity of the product; or

(iii) The use of a cocktail name as a brand name or fanciful name of a malt beverage, provided that the overall label does not present a misleading impression about the identity of the product.

* * * * *

■ 6. We amend § 7.31 by redesignating paragraph (d) as paragraph (e) and by adding a new paragraph (d) to read as follows:

§ 7.31 Label approval and release.

* * * * *

(d) *Formula and samples.* The appropriate TTB officer may require an importer to submit a formula for a malt beverage, or a sample of any malt beverage or ingredients used in producing a malt beverage, prior to or in conjunction with the filing of a certificate of label approval on TTB Form 5100.31.

* * * * *

■ 7. We amend § 7.54 by revising the introductory text of paragraph (a) and by adding a new paragraph (a)(8) to read as follows:

§ 7.54. Prohibited statements.

(a) *General prohibition.* An advertisement of malt beverages must not contain:

* * * * *

(8) Any statement, design, device, or representation that tends to create a false or misleading impression that the malt beverage contains distilled spirits or is a distilled spirits product. This paragraph does not prohibit the following in advertisements for malt beverages:

(i) A truthful and accurate statement of alcohol content, in conformity with § 7.71;

(ii) The use of a brand name of a distilled spirits product as a malt beverage brand name, provided that the overall advertisement does not present a misleading impression about the identity of the product; or

(iii) The use of a cocktail name as a brand name or fanciful name of a malt beverage, provided that the overall advertisement does not present a misleading impression about the identity of the product.

* * * * *

PART 25—BEER

■ 8. The authority citation for part 25 continues to read as follows:

Authority: 19 U.S.C. 81c; 26 U.S.C. 5002, 5051–5054, 5056, 5061, 5091, 5111, 5113, 5142, 5143, 5146, 5222, 5401–5403, 5411–5417, 5551, 5552, 5555, 5556, 5671, 5673, 5684, 6011, 6061, 6065, 6091, 6109, 6151, 6301, 6302, 6311, 6313, 6402, 6651, 6656, 6676, 6806, 7011, 7342, 7606, 7805; 31 U.S.C. 9301, 9303–9308.

■ 9. We amend § 25.11 by revising the definition of ''beer'' to read as follows:

§ 25.11 Meaning of terms.

* * * * *

Beer. Beer, ale, porter, stout, and other similar fermented beverages (including saké and similar products) of any name or description containing one-half of one percent or more of alcohol by volume, brewed or produced from malt, wholly or in part, or from any substitute for malt. Standards for the production of beer appear in § 25.15.

* * * * *

■ 10. We amend subpart B by adding an undesignated center heading and a new § 25.15 to read as follows:

Standards for Beer

§ 25.15 Materials for the production of beer.

(a) Beer must be brewed from malt or from substitutes for malt. Only rice, grain of any kind, bran, glucose, sugar, and molasses are substitutes for malt. In addition, you may also use the following materials as adjuncts in fermenting beer: honey, fruit, fruit juice, fruit concentrate, herbs, spices, and other food materials.

(b) You may use flavors and other nonbeverage ingredients containing alcohol in producing beer. Flavors and other nonbeverage ingredients containing alcohol may contribute no more than 49% of the overall alcohol content of the finished beer. For example, a finished beer that contains 5.0% alcohol by volume must derive a minimum of 2.55% alcohol by volume from the fermentation of ingredients at the brewery and may derive not more than 2.45% alcohol by volume from the addition of flavors and other nonbeverage ingredients containing alcohol. In the case of beer with an alcohol content of more than 6% by volume, no more than 1.5% of the volume of the beer may consist of alcohol derived from added flavors and other nonbeverage ingredients containing alcohol.

■ 11. We amend subpart F by adding two undesignated center headings, and by adding new §§ 25.53 and 25.55 through 25.58, to read as follows:

Samples

§ 25.53 Submissions of samples of fermented products.

The appropriate TTB officer may, at any time, require you to submit samples of:

(a) Cereal beverage, saké, or any fermented product produced at the brewery,

(b) Materials used in the production of cereal beverage, saké, or any fermented product; and

(c) Cereal beverage, saké, or any fermented product, in conjunction with the filing of a formula.

(26 U.S.C. 5415, 5555, 7805(a))

Formulas

§ 25.55 Formulas for fermented products.

(a) *For what fermented products must a formula be filed?* You must file a formula for approval by TTB if you intend to produce:

(1) Any fermented product that will be treated by any processing, filtration, or other method of manufacture that is not generally recognized as a traditional process in the production of a fermented beverage designated as ''beer,'' ''ale,'' ''porter,'' ''stout,'' ''lager,'' or ''malt liquor.'' For purposes of this paragraph:

(i) Removal of any volume of water from beer, filtration of beer to substantially change the color, flavor, or character, separation of beer into different components, reverse osmosis, concentration of beer, and ion exchange treatments are examples of non-traditional processes for which you must file a formula.

(ii) Pasteurization, filtration prior to bottling, filtration in lieu of pasteurization, centrifuging for clarity, lagering, carbonation, and blending are examples of traditional processes for which you do not need to file a formula.

(iii) If you have questions about whether or not use of a particular process not listed in this section requires the filing of a formula, you may request a determination from TTB in

accordance with paragraph (f) of this section.

(2) Any fermented product to which flavors or other nonbeverage ingredients (other than hop extract) containing alcohol will be added.

(3) Subject to paragraph (f) of this section, any fermented product to which coloring or natural or artificial flavors will be added.

(4) Subject to paragraph (f) of this section, any fermented product to which fruit, fruit juice, fruit concentrate, herbs, spices, honey, maple syrup, or other food materials will be added.

(5) Saké, including flavored saké and sparkling saké.

(b) *Are separate formulas required for different products?*

(1) You must file a separate formula for approval for each different fermented product for which a formula is required.

(2) You may file a formula for a beer base to be used in the production of one or more other fermented products. The beer base must conform to the standards set forth in § 25.15.

(c) *When must I file a formula?*

(1) Except as provided in paragraph (c)(2) of this section, you may not produce a fermented product for which a formula is required until you have filed and received approval of a formula for that product.

(2) You may, for research and development purposes (including consumer taste testing), produce a fermented product without an approved formula, but you may not sell or market this product until you receive approval of the formula for it.

(d) *How long is my formula approval valid?* Your formula approved under this section remains in effect until: you supersede it with a new formula; you voluntarily surrender the formula; TTB cancels or revokes the formula; or the formula is revoked by operation of law or regulation.

(e) *Are my previously approved statements of process valid?* Your statements of process approved before January 3, 2006 are considered approved formulas under this section, provided that any finished product that could be made under the statement of process would be in compliance with the provisions of this part. You do not need to submit a formula for approval if a statement of process that remains valid covers the product.

(f) *Determinations by TTB regarding specific processes and ingredients.*

(1) The appropriate TTB officer may determine whether or not use of a process not listed in paragraph (a)(1) of this section requires you to file a formula for approval. The appropriate TTB officer may also exempt the use of a particular coloring, flavoring, or food material from the formula filing requirement of paragraph (a)(3) or paragraph (a)(4) of this section upon a finding that the coloring, flavoring, or food material in question is generally recognized as a traditional ingredient in the production of a fermented beverage designated as ''beer,'' ''ale,'' ''porter,'' ''stout,'' ''lager,'' or ''malt liquor.''

(2) You may request a determination from TTB on whether or not the use of a process not listed in paragraph (a)(1) of this section will require the filing of a formula or whether the use of a particular coloring, flavoring or food material may be exempted from the formula filing requirement of paragraph (a)(3) or paragraph (a)(4) of this section. You should mail your request to the Assistant Chief, Advertising, Labeling and Formulation Division, Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street, NW., Washington, DC 20220.

(i) When requesting a determination as to whether a process is subject to the formula filing and approval requirement, the request must include:

(A) A detailed description of the proposed process;

(B) Evidence establishing that the proposed process is generally recognized as a traditional process in the production of a fermented beverage designated as ''beer,'' ''ale,'' ''porter,'' ''stout,'' ''lager,'' or ''malt liquor''; and

(C) An explanation of the effect of the proposed process on the production of a fermented product.

(ii) When requesting an exemption from the formula filing requirement in paragraph (a)(3) or paragraph (a)(4) of this section regarding coloring, flavoring, or food material ingredients, the request must include the following information:

(A) A description of the proposed ingredient;

(B) Evidence establishing that the proposed ingredient is generally recognized as a traditional ingredient in the production of a fermented beverage designated as ''beer,'' ''ale,'' ''porter,'' ''stout,'' ''lager,'' or ''malt liquor''; and

(C) An explanation of the effect of the proposed ingredient in the production of a fermented product.

§ 25.56 Filing of formulas.

(a) *What are the general requirements for filing a formula?* (1) You must file your formula in writing. Your formula must identify each brewery where the formula applies by including each brewery name, address, and registry number.

(2) You must serially number each formula, commencing with ''1'' and continuing in numerical sequence.

(3) You must date and sign each formula.

(4) You must file two copies of each formula with TTB.

(b) *Where do I file a formula?* File your formula with the Assistant Chief, Advertising, Labeling and Formulation Division, Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street, NW., Washington, DC 20220.

(26 U.S.C. 5401, 7805)

§ 25.57 Formula information.

(a) *Ingredient information.* (1) For each formula you must list each separate ingredient and the specific quantity used, or a range of quantities used. You may include optional ingredients in a formula if they do not impact the labeling or identity of the finished product.

(2) For fermented products containing flavorings you must list for each formula: The name of the flavor; the product number or TTB drawback number and approval date of the flavor; the name and location (city and State) of the flavor manufacturer; the alcohol content of the flavor; and the point of production at which the flavor was added (that is, before, during, or after fermentation).

(3) For formulas that include the use of flavors and other nonbeverage ingredients containing alcohol, you must explicitly indicate:

(i) The volume and alcohol content of the beer base;

(ii) The maximum volumes of the flavors and other nonbeverage ingredients containing alcohol to be used;

(iii) The alcoholic strength of the flavors and other nonbeverage ingredients containing alcohol;

(iv) The overall alcohol contribution to the finished product provided by the addition of any flavors or other nonbeverage ingredients containing alcohol. You are not required to list the alcohol contribution of individual flavors and other nonbeverage ingredients containing alcohol. You may state the total alcohol contribution from these ingredients to the finished product; and

(v) The final volume and alcohol content of the finished product.

(b) *Process information.* For each formula you must describe in detail each process used to produce a fermented beverage.

(c) *Alcohol content.* For each formula you must state the alcohol content of the fermented product after fermentation

and the alcohol content of the finished product.

(d) *Beer base formulas.* You must refer in your formula to any approved formula number that covers the production of any beer base used in producing the formula product. If the beer base was produced by another brewery of the same ownership, you must also provide the name and address or name and registry number of that brewery.

(e) *Additional information.* The appropriate TTB officer may at any time require you to file additional information concerning a fermented product, ingredients, or processes, in order to determine whether a formula should be approved or disapproved or whether the approval of a formula should be continued.

(26 U.S.C. 5415, 5555, 7805(a))

§ 25.58 New and superseding formulas.

(a) *New formulas.* Except as otherwise provided in paragraph (b) of this section, you must file a new formula (with a new formula number) for approval by TTB if you—

(1) Create an entirely new fermented product that requires a formula;

(2) Add new ingredients to an existing formulation;

(3) Delete ingredients from an existing formulation;

(4) Change the quantity of an ingredient used from the quantity or range of usage in an approved formula;

(5) Change an approved processing, filtration, or other special method of manufacture that requires the filing of a formula; or

(6) Change the contribution of alcohol from flavors or ingredients that contain alcohol.

(b) *Superseding formulas.* You may file a superseding formula, instead of a new formula, if you have made any change listed in paragraphs (a)(2) through (a)(6) of this section and that change is not of a type that would require a holder of a certificate of label approval to file a new application for label approval on TTB Form 5100.31.

(1) A superseding formula replaces an existing formula, and you should file one only if you do not intend to use the existing formula any more. A superseding formula must be filed with TTB for approval. When TTB approves a superseding formula, TTB will cancel your previous formula.

(2) You may use the same formula number for a superseding formula that you used for the formula the superseding formula replaces, but you must annotate the formula number to indicate it is a superseding formula number. (For example, ''Formula 2, superseding.'')

(c) When you file a new or superseding formula with TTB, you must follow the procedures and other requirements of §§ 25.56 and 25.57.

§ 25.62 [Amended]

■ 12. We amend § 25.62 by removing and reserving paragraph (a)(7).

§ 25.67 [Removed and Reserved]

■ 13. We amend Subpart G by removing and reserving § 25.67.

§ 25.76 [Removed and Reserved]

■ 14. We amend Subpart G by removing and reserving § 25.76.

Signed: August 6, 2004.

Arthur J. Libertucci,

Administrator.

Approved: December 22, 2004.

Timothy E. Skud,

Deputy Assistant Secretary (Tax, Trade, and Tariff Policy).

[FR Doc. 04–28460 Filed 12–29–04; 8:45 am]

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Federal Register

Monday,
January 3, 2005

Part IV

Department of Transportation

Federal Aviation Administration

14 CFR Parts 47 and 49

Cape Town Treaty Implementation; Final Rule

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 47 and 49

[Docket No. FAA–2004–19944; Amendment Nos. 47–27 and 49–10]

RIN 2120–AI48

Cape Town Treaty Implementation

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule with opportunity to comment on information collection requirements.

SUMMARY: The FAA is revising the regulations concerning registering aircraft and recording security documents. The Cape Town Treaty establishes a new International Registry for registering interests against certain aircraft and aircraft engines. Section 4 of the Cape Town Treaty Implementation Act of 2004 requires the FAA to make certain changes. This action will enable persons to transmit information to the new International Registry concerning certain aircraft and aircraft engines by making the FAA Aircraft Registry the U.S. authorizing entry point to the International Registry. We are also making unrelated technical changes to other portions of the regulations in this document.

DATES: These amendments become effective concurrent with the date the Cape Town Treaty enters into force with respect to the United States, except for subpart F of part 49 which contains information collection requirements that are not effective until approved by the Office of Management and Budget. FAA will publish a document announcing the effective date of this final rule.

Send your comments on the information collection requirements on or before March 4, 2005.

ADDRESSES: You may send comments on the information collection requirements [identified by Docket Number FAA–2004–19944] using any of the following methods:

- DOT Docket Web site: Go to *http://dms.dot.gov* and follow the instructions for sending your comments electronically.
- Government-wide rulemaking Web site: Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- Mail: Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590–001.
- Fax: 1–202–493–2251.
- Hand Delivery: Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- Mail: Office of Information and Regulatory Affairs, OMB, New Executive Building, Room 10202, 725 17th Street, NW., Washington, DC 20053, Attention: Desk Officer for FAA.

For more information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

Privacy: We will post all comments we receive, without change, to *http://dms.dot.gov*, including any personal information you provide. For more information, see the Privacy Act discussion in the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: To read background documents or comments received, go to *http://dms.dot.gov* at any time or to Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Mr. Mark D. Lash, Civil Aviation Registry, Mike Monroney Aeronautical Center, 6500 South MacArthur Blvd., Oklahoma City, OK 73169, telephone (405) 954–4331.

SUPPLEMENTARY INFORMATION:

Availability of Rulemaking Documents

You can get an electronic copy using the Internet by:

(1) Searching the Department of Transportation's electronic DocketManagement System (DMS) Web page (*http://dms.dot.gov/search*);

(2) Visiting the Office of Rulemaking's Web page at *http://www.faa.gov/avr/arm/index.cfm*; or

(3) Accessing the Government Printing Office's Web page at *http://www.access.gpo.gov/su_docs/aces/aces140.html*.

You can also get a copy by submitting a request to the Federal Aviation Administration, Office of Rulemaking, ARM–1, 800 Independence Avenue SW., Washington, DC 20591, or by calling (202) 267–9680. Make sure to identify the amendment number or docket number of this rulemaking.

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78) or you may visit *http://dms.dot.gov*.

Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 requires FAA to comply with small entity requests for information or advice about compliance with statutes and regulations within its jurisdiction. If you are a small entity and you have a question regarding this document, you may contact your local FAA official, or the person listed under **FOR FURTHER INFORMATION CONTACT**. You can find out more about SBREFA on the Internet at *http://www.faa.gov/avr/arm/sbrefa.cfm*.

The Cape Town Treaty

The Cape Town Treaty [1] (the Treaty) creates a new international legal framework to give greater security to those who finance the purchase of aircraft, aircraft engines and certain helicopters. The financing provisions of the Treaty are fully consistent with current U.S. law under the Uniform Commercial Code. The Treaty establishes an International Registry where rights in aircraft, aircraft engines, and helicopters may be registered. The sole purpose of this registry is to establish the priorities between competing interests against certain aircraft and aircraft engines. There are no safety, oversight, or other regulatory implications. The existing FAA Aircraft Registry will be preserved and work in tandem with the new International Registry.

The Treaty represents an advance in international aviation financing and will be beneficial to U.S. aviation and aerospace interests. Key Federal agencies concerned with civil aviation and U.S. exports, including the FAA, the Export-Import Bank of the United States, and the Departments of Commerce, State, and Transportation, support the Treaty.

An important difference between the FAA Aircraft Registry and the new International Registry is that parties having recordable interests in U.S. aircraft and related equipment file their complete documents relating to the interest with the FAA Registry, while they will file only electronic notices of such interests with the International Registry.

The Treaty enters into force three months after the eighth country deposits

[1] The full name of the Treaty is the Convention on International Interests in Mobile Equipment and the Protocol on Matters Specific to Aircraft Equipment. We have placed a copy of the Treaty in the docket for this rulemaking.

formal instruments with the International Institute for the Unification of Private Law (Unidroit) depositary in Rome. To date, five countries, including the United States, have deposited instruments of ratification. The United States Senate approved the Treaty on July 21, 2004. On October 28, 2004, the United States deposited its instruments of ratification and adoption with Unidroit in Rome. It is anticipated that ratification by at least three more countries will follow shortly.

The Cape Town Treaty Implementation Act

On August 9, 2004, the President signed the Cape Town Treaty Implementation Act of 2004, Public Law 108–297, which requires conforming changes to the regulations concerning registration and deregistration of aircraft. The Act designates the FAA Aircraft Registry as the U.S. entry point to the International Registry relating to civil aircraft of the United States, aircraft for which a United States identification has been assigned (but only with respect to notices of prospective assignments, interests, and sales), and aircraft engines.

The Act also provides for the filing of notices of prospective interests. Under the Treaty, priority is established by the date of the filing of the notice of prospective interest. The FAA must establish a system for filing such notices and authorizing the parties to transmit information to the International Registry. Under section 3 of the Act, the filing of a notice of prospective assignment, interest or sale with the FAA Aircraft Registry and registration with the International Registry is not valid unless the parties subsequently file with the FAA, within 60 days, their recordable documents relating to the notice.

The Act also makes conforming amendments to existing law to recognize the application of the Treaty. It allows recording with the FAA against slightly less powerful engines to be consistent with the threshold requirements of the Treaty. It directs the FAA to immediately prescribe regulations for the registration and deregistration of aircraft according to the terms of the Treaty. The FAA is to complete the rulemaking by December 31, 2004 under an expedited process without preparing an economic analysis of the cost and benefits associated with the rule. To provide legal certainty and clarity during the rulemaking process, the Act expressly provides that the Treaty applies to those matters covered by the rulemaking until the final rule is effective, or December 31, 2004, whichever is earlier.

The amendments made by the Act are effective when the Treaty comes into force with respect to the U.S., and do not apply retroactively. The Act does not affect any existing rights.

Section-by-Section Analysis of the Final Rule

Section 47.13 Signatures and Instruments Made by Representatives

The final rule amends paragraph (d), which sets forth the signature requirements applicable when a corporation files an application for aircraft registration or a request for registration cancellation. Under existing § 47.13(d)(3), a corporation must file a copy of the authorization from the board of directors to sign for the corporation with the application or cancellation request, unless the signer is a corporate officer or other person in a managerial position or a valid authorization to sign is already on file at the FAA Aircraft Registry. This final rule adds paragraph (d)(4), which creates an exception to the provisions of paragraph (d)(3) for an irrevocable deregistration and export request authorization prepared under the terms of the Treaty. The purpose of this change is to allow the FAA Aircraft Registry to accept and process documents consistent with the Treaty.

Section 47.37 Aircraft Last Previously Registered in a Foreign Country

The final rule amends paragraph (a)(3) to require the owner(s) of aircraft last previously registered in a foreign country in which the Treaty is in effect to submit evidence satisfactory to the FAA that all holders of priority interests have been satisfied or have consented to the deregistration and export of the aircraft. Currently paragraph (a)(3) does not contain any reference to the Treaty. By requiring evidence that all holders of priority interests have been satisfied, the final rule conforms to the Treaty.

Section 47.47 Cancellation of Certificate for Export Purpose

Section 47.47 sets forth the requirements applicable to cancellation of U.S. aircraft registration for the purpose of export. The final rule expands the scope of paragraph (a) to include holders of authorizations recognized under the Treaty. The final rule also adds the specific information that the FAA must receive for aircraft subject to the Treaty, including a certification that all priority interests have been discharged or consented to.

Section 49.41 Applicability

Section 49.41 currently applies to the recording of leases, tax liens, and other kinds of conveyances that affect title to, or any interest in, any specifically identified aircraft engine of 750 or more rated takeoff horsepower, or equivalent horsepower. This final rule lowers the horsepower threshold for aircraft engines from 750 to 550. The purpose of this change is to conform our regulations to the provisions of the Treaty. Horsepower rating for propellers remains unchanged since the Treaty does not pertain to propellers.

Subpart F—Transmission of Information to the International Registry

The final rule adds subpart F, consisting of §§ 49.61 and 49.63, to establish a procedure for getting authorization from the FAA Aircraft Registry to send information to the International Registry.

Section 49.61 Applicability

This new section designates the FAA Aircraft Registry as the U.S. entry point for transmitting information to the International Registry with respect to civil aircraft of the United States, aircraft assigned a U.S. identification number, and aircraft engines with a rated takeoff horsepower of at least 550. This change will preserve the recordation function of the FAA Aircraft Registry and allow it to work in tandem with the new International Registry.

Section 49.63 Eligibility for Authorization for Transmission to the International Registry: General Requirements

This new section sets forth the requirements for obtaining a unique authorization code from the FAA Aircraft Registry. The authorization code will enable requesters to electronically send information, including information about prospective interests, directly to the International Registry. To get an authorization code, a requester must file a completed AC Form 8050–135 with the FAA Aircraft Registry. On the form, requesters will provide their identification and contact information, as well as a limited amount of other relevant information.

In addition to filing the form, anyone requesting an authorization code must also file any recordable documents relating to their interest with the FAA Aircraft Registry. For civil aircraft of the United States, this means documents recordable under part 49, subpart C, including the conveyances identified in § 49.31. For aircraft engines, this means documents recordable under part 49,

subpart D, including the conveyances identified in § 49.41. For aircraft that have been assigned a U.S. identification number but are not civil aircraft of the United States, the requester only has to file the AC Form 8050–135.

Readers should note that while the final rule requires requesters to file recordable documents relating to an interest with the FAA Aircraft Registry, it does not require them to file the recordable documents with the International Registry. The International Registry is an electronic, notice-based system. Readers should also note that, consistent with the Treaty, § 49.63(b) of the final rule does not require use of the FAA Aircraft Registry as the entry point to the International Registry for aircraft engines.

Technical Amendments

In addition to the changes we are adopting to implement the Treaty, discussed above, we are also adopting a series of non-substantive changes to parts 47 and 49. These technical amendments, which are described in more detail below, are primarily editorial in nature and, in many cases, are simply intended to update references to the United States Code.

Part 47—Aircraft Registration

We are replacing all references to the Federal Aviation Act of 1958 with current United States Code citations according to the following table:

Existing reference	Amended to	Section affected
Section 501 of the Federal Aviation Act of 1958 (49 U.S.C. 1401)	49 U.S.C. 44101–44104	14 CFR 47.1.
Section 501(b) of the Federal Aviation Act of 1958 (49 U.S.C. 1401(b))	49 U.S.C. 44102	14 CFR 47.3(a).
Section 501 of the Federal Aviation Act of 1958	49 U.S.C. 44101–44104	14 CFR 47.3(b).
Section 501(f) of the Act (49 U.S.C. 1401(f))	49 U.S.C. 44103(c)	14 CFR 47.5(c).
Section 501(b)(1)(A)(i) of the Act	49 U.S.C. 44102	14 CFR 47.7(b), (c), and (d).
Section 101(16) of the Act	49 U.S.C. 40102(a)(15)	14 CFR 47.8(a)(2)(i).
Section 501(b)(2)(A)(ii) of the Act	49 U.S.C. 44102	14 CFR 47.9(a), (e), and (f).
Federal Aviation Act of 1958	49 U.S.C. 44101–44104	14 CFR 47.33(a).
Federal Aviation Act of 1958	49 U.S.C. 44101–44104	14 CFR 47.35(a).
Section 501 of the Federal Aviation Act of 1958 (49 U.S.C. 1401)	49 U.S.C. 44101–44104	14 CFR 47.43(a)(4).
Section 101(13) of the Federal Aviation Act of 1958 (49 U.S.C. 1301)	49 U.S.C. 40102(a)(15)	14 CFR 47.65.

We are also amending § 47.2, *Definitions*, to remove the definition of the Act of 1958. We are amending § 47.3, *Registration required*, to refer to the requirements for registration as stated in 49 U.S.C. 44103. We are amending § 47.19, *FAA Aircraft Registry*, to reflect the current address of the FAA Aircraft Registry. And, in newly redesignated paragraph (c) of § 47.47, *Cancellation of certificate for export purpose*, we are removing references to older means of communication by which FAA notifies the country to which the aircraft is to be exported of the cancellation of registration.

Part 49—Recording of Aircraft Titles and Security Documents

We are replacing all references to the Federal Aviation Act of 1958 with current United States Code citations according to the following table:

Existing reference	Amended to	Section affected
Section 501 of the Federal Aviation Act of 1958 (49 U.S.C. 1401)	49 U.S.C. 44101–44104	14 CFR 49.1(a)(1).
Section 604(b) of the Federal Aviation Act of 1958 (49 U.S.C. 1424(b))	49 U.S.C. 44705	14 CFR 49.1(a)(4).
Section 503(e) of the Federal Aviation Act of 1958 (49 U.S.C. 1403(e))	49 U.S.C. 44107(c)	14 CFR 49.13(c).
Section 101(17) of the Federal Aviation Act of 1958 (49 U.S.C. 1301)	49 U.S.C. 40102(a)(19)	14 CFR 49.17(a).
Section 101(19) of the Federal Aviation Act of 1958 (49 U.S.C. 1301(19)).	49 U.S.C. 40102(a)(18)	14 CFR 49.17(d)(6).
Section 501 of the Federal Aviation Act of 1958 (49 U.S.C. 1401)	49 U.S.C. 44101–44104	14 CFR 49.33(d).
Section 604(b) of the Federal Aviation Act of 1958 (49 U.S.C. 1424(b))	49 U.S.C. 44705	14 CFR 49.51(a).
Section 604(b) of the Federal Aviation Act of 1958 (49 U.S.C. 1424(b))	49 U.S.C. 44705	14 CFR 49.53(a)(1).

We are also amending § 49.11, *FAA Aircraft Registry,* to reflect the current delivery address and include the nine-digit zip code for the post office box. And, we are amending paragraph (a) of § 49.17, *Conveyances Recorded,* to define the term, ''conveyance,'' consistent with 49 U.S.C. § 40102(a)(19).

Justification for Expedited Rulemaking

Section 553 of the Administrative Procedure Act, 5 U.S.C. 553(b), provides that when an agency for good cause finds that the notice and public comment procedure is impracticable, unnecessary, or contrary to the public interest, the agency may issue a rule without providing notice and an opportunity for public comment. For the changes we are adopting to implement the Treaty, we find the notice and public comment procedure is unnecessary. Given the non-controversial nature of the rulemaking, the clear content of the rules adopted based on express provisions in the Treaty, the fact that the development of the Treaty had broad participation by the international aviation industry and Government agencies, and the potential economic benefits, we find that no public purpose would be served by unnecessary delay. In addition, section 4 of the Cape Town Treaty Implementation Act (Pub. L. 108–297, Aug. 9, 2004) requires the FAA to publish a final rule by December 31, 2004. It does not require FAA to prepare an analysis of the cost and benefits of the final rule. For the technical amendments, we also find the notice and public comment procedure is unnecessary. The technical amendments are minor procedural and editorial changes that do not affect the substance of the existing rules.

Paperwork Reduction Act

This proposal contains the following new information collection requirements. As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the FAA has submitted the information requirements associated

with this final rule to the Office of Management and Budget with a request for clearance.

Title: FAA Entry Point Filing Form—International Registry, AC Form 8050–135.

Summary: The FAA Civil Aviation Registry was designated by Congress as the exclusive entry point for transmitting information to the International Registry as provided for in the Treaty. The Cape Town Treaty Implementation Act of 2004 (Pub. L. 108–297) directed the FAA to establish a system for filing notices of international and prospective international interests, and authorizing parties to transmit information to the International Registry.

To implement these requirements, the FAA Civil Aviation Registry will require the submission of a completed FAA Entry Point Filing Form—International Registry, AC Form 8050–135, to issue an authorization code. This code allows for the transmission of information to the International Registry with respect to civil aircraft of the United States, aircraft assigned a U.S. identification number, and aircraft engines with a rated takeoff horsepower of at least 550.

Use of Information Collected: The FAA has no specific use for the information collected. The disclosure activities include information being transmitted to the International Registry, consisting of party name(s), collateral description(s), and the type of interest being filed. Additionally, the name of the submitter, address and telephone number will also be on the AC Form 8050–135. The party name(s), collateral description(s), and the authorization code will be entered into the FAA Civil Aviation Registry's existing database system, as search criteria. The FAA expects that interested parties will access the information to determine if an authorization code was issued. The user may then request a copy of the completed AC Form 8050–135, or check the International Registry to determine if an interest has been registered there.

Respondents: The respondents to this information collection are persons who want to file an interest with the International Registry. We estimate the number of security agreements that would likely be filed with the Registry under the rule would total 15,000 per year.

Frequency: The respondents would file AC Form 8050–135 with the FAA Civil Aviation Registry on an as-needed basis determined by the respondent.

Annual Burden Estimate: We estimate the time to complete the single-page AC Form 8050–135 is 30 minutes or less. Therefore, respondents would spend approximately 7,500 hours annually completing the required form.

The agency is soliciting comments to—

(1) Evaluate whether the information requirement is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Individuals and organizations may provide comments on the information collection requirement by March 4, 2005, and should direct them to the address listed in the **ADDRESSES** section of this document. Comments also should be sent to the Office of Information and Regulatory Affairs, OMB, New Executive Building, Room 10202, 725 17th Street, NW., Washington, DC 20053, Attention: Desk Officer for FAA.

According to the 1995 amendments to the Paperwork Reduction Act (5 CFR 1320.8(b)(2)(vi)), an agency may not collect or sponsor the collection of information, nor may it impose an information collection requirement unless it displays a currently valid OMB control number. The FAA will publish the OMB control number for this collection in the **Federal Register**, after the Office of Management and Budget approves it.

International Compatibility

In keeping with U.S. obligations under the Convention on International Civil Aviation, it is FAA policy to comply with International Civil Aviation Organization (ICAO) Standards and Recommended Practices to the maximum extent practicable. The FAA has reviewed the corresponding ICAO Standards and Recommended Practices and has identified no differences with them. In fact, ICAO will likely be the Supervisory Authority for the International Registry.

Economic Assessment, Regulatory Flexibility Determination, International Trade Impact Assessment, and Unfunded Mandates Assessment

Changes to Federal regulations must undergo several economic analyses. First, Executive Order 12866 directs each Federal agency to propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Trade Agreements Act (19 U.S.C. 2531–2533) prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States. In developing U.S. standards, this Trade Act requires agencies to consider international standards and, where appropriate, that they be the basis for U.S. standards. Fourth, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more annually (adjusted for inflation).

If it is determined that the expected impact is so minimal that the final rule does not warrant a full cost-benefit evaluation, Department of Transportation Order DOT 2100.5 permits a statement to that effect and the basis for it to be included in the preamble and a full cost-benefit evaluation need not be prepared. Moreover, section 4 of the Cape Town Treaty Implementation Act (Pub. L. 108–297) states that the FAA is not required to prepare an economic analysis of the cost and benefits of the final rule.

Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (RFA) establishes ''as a principle of regulatory issuance that agencies shall endeavor, consistent with the objective of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the business, organizations, and governmental jurisdictions subject to regulation.'' To achieve that principle, the RFA requires agencies to solicit and consider flexible regulatory proposals and to explain the rationale for their actions. The RFA covers a wide range of small entities, including small businesses, not-for-profit organizations and small governmental jurisdictions.

Agencies must perform a review to determine whether a proposed or final rule will have a significant economic impact on a substantial number of small entities. If the agency determines that it will, the agency must prepare a regulatory flexibility analysis as described in the RFA.

However, if an agency determines that a proposed or final rule is not expected to have a significant economic impact on a substantial number of small entities, section 605(b) of the RFA provides that the head of the agency may so certify and a regulatory flexibility analysis is not required. The certification must include a statement providing the factual basis for this determination, and the reasoning should be clear.

This final rule will help promote the export of U.S.-manufactured products by reducing aircraft and engine financing costs, thus facilitating the acquisition of newer, safer aircraft. Therefore, the final rule will have a positive impact (or, at worst, no impact) on small aviation operators and on small aviation manufacturers. Consequently, the FAA certifies that the final rule will not have a significant economic impact on a substantial number of small entities.

International Trade Impact Assessment

The Trade Agreement Act of 1979 prohibits Federal agencies from establishing any standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. This final rule implements in the United States minor technical changes necessary to support the Treaty, particularly with respect to the relationship between the International Registry and the FAA Aircraft Registry. Thus, the FAA has assessed the potential effect of this rulemaking and has determined that it will accept international registration standards defined by the Treaty as a basis for U.S. regulation and promote free trade.

Unfunded Mandates Assessment

The Unfunded Mandates Reform Act of 1995 (the Act) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments. Title II of the Act requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in an expenditure of $100 million or more (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector; such a mandate is deemed to be a ''significant regulatory action.'' The FAA currently uses an inflation-adjusted value of $120.7 million in lieu of $100 million.

This final rule does not contain such a mandate. The requirements of title II of the Act, therefore, do not apply.

Executive Order 13132, Federalism

The FAA has analyzed this final rule under the principles and criteria of Executive Order 13132, Federalism. We determined that this action will not have a substantial direct effect on the States, or the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government, and therefore does not have federalism implications.

Environmental Analysis

FAA Order 1050.1E identifies FAA actions that are categorically excluded from preparation of an environmental assessment or environmental impact statement under the National Environmental Policy Act in the absence of extraordinary circumstances. The FAA has determined this rulemaking action qualifies for the categorical exclusion identified in paragraph 307(f) and involves no extraordinary circumstances.

Regulations That Significantly Affect Energy Supply, Distribution, or Use

The FAA has analyzed this final rule under Executive Order 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use (May 18, 2001). We have determined that it is not a ''significant energy action'' under the executive order because it is not a ''significant regulatory action'' under Executive Order 12866, and it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

List of Subjects

14 CFR Part 47

Aircraft, Reporting and recordkeeping requirements.

14 CFR Part 49

Aircraft, Reporting and recordkeeping requirements.

The Amendments

■ In consideration of the foregoing, the Federal Aviation Administration amends chapter I of title 14, Code of Federal Regulations as follows:

PART 47—AIRCRAFT REGISTRATION

■ 1. Revise the authority citation for part 47 to read as follows:

Authority: 4 U.S.T. 1830; Pub. L. 108–297, 118 Stat. 1095 (49 U.S.C. 40101 note, 49 U.S.C. 44101 note); 49 U.S.C. 106(g), 40113–40114, 44101–44108, 44110–44113, 44703–44704, 44713, 45302, 46104, 46301.

■ 2. Revise § 47.1 to read as follows:

§ 47.1 Applicability.

This part prescribes the requirements for registering aircraft under 49 U.S.C. 44101–44104. Subpart B applies to each applicant for, and holder of, a Certificate of Aircraft Registration. Subpart C applies to each applicant for and holder of, a Dealers' Aircraft Registration Certificate.

§ 47.2 [Amended]

■ 3. Amend § 47.2 by removing the definition of ''Act'' entirely.

■ 4. Amend § 47.3 by revising paragraph (a) and the introductory language of paragraph (b) to read as follows:

§ 47.3 Registration required.

(a) An aircraft may be registered under 49 U.S.C. 44103 only when the aircraft is—

(1) Not registered under the laws of a foreign country and is owned by—

(i) A citizen of the United States;

(ii) An individual citizen of a foreign country lawfully admitted for permanent residence in the United States; or

(iii) A corporation not a citizen of the United States when the corporation is organized and doing business under the laws of the United States or a State, and the aircraft is based and primarily used in the United States; or

(2) An aircraft of—

(i) The United States Government; or

(ii) A State, the District of Columbia, a territory or possession of the United States, or a political subdivision of a State, territory, or possession.

(b) No person may operate an aircraft that is eligible for registration under 49 U.S.C. 44101–44104, unless the aircraft—

* * * * *

■ 5. Amend § 47.5 by revising the first sentence of paragraph (c) to read as follows:

§ 47.5 Applicants.

* * * * *

(c) 49 U.S.C. 44103(c), provides that registration is not evidence of ownership of aircraft in any proceeding in which ownership by a particular person is in issue. * * *

* * * * *

§ 47.7 [Amended]

■ 6. Amend § 47.7 paragraphs (b), (c), and (d) by revising the references to ''section 501(b)(1)(A)(i) of the Act'' in the

first sentence of each paragraph to read ''49 U.S.C. 44102.''

■ 7. Amend § 47.8 by revising paragraph (a)(2)(i) to read as follows:

§ 47.8 Voting trusts.

(a) * * *

(1) * * *

(2) * * *

(i) That each voting trustee is a citizen of the United States within the meaning of 49 U.S.C. 40102(a)(15).

* * * * *

§ 47.9 [Amended]

■ 8. Amend § 47.9 paragraphs (a), (e), and (f) by revising the references to ''section 501(b)(1)(A)(ii) of the Act'', in the first sentence of each paragraph to read 49 U.S.C. 44102.

■ 9. Amend § 47.13 by adding paragraph (d)(4) to read as follows:

§ 47.13 Signatures and instruments made by representatives.

* * * * *

(d) * * *

(4) The provisions of paragraph (d)(3) do not apply to an irrevocable deregistration and export request authorization when an irrevocable deregistration and export request authorization under the Cape Town Treaty is signed by a corporate officer and is filed with the FAA Aircraft Registry.

* * * * *

■ 10. Revise § 47.19 to read as follows:

§ 47.19 FAA Aircraft Registry.

Each application, request, notification, or other communication sent to the FAA under this Part must be mailed to the FAA Aircraft Registry, Department of Transportation, Post Office Box 25504, Oklahoma City, Oklahoma 73125–0504, or delivered to the Registry at 6425 S. Denning Ave., Oklahoma City, Oklahoma 73169.

■ 11. Amend § 47.33 by revising paragraph (a) introductory text to read as follows:

§ 47.33 Aircraft not previously registered anywhere.

(a) A person who is the owner of an aircraft that has not been registered under 49 U.S.C. 44101–44104, under other law of the United States, or under foreign law, may register it under this part if he—

* * * * *

■ 12. Amend § 47.35 by revising paragraph (a) to read as follows:

§ 47.35 Aircraft last previously registered in the United States.

(a) A person who is the owner of an aircraft last previously registered under 49 U.S.C. Sections 44101–44104, or under other law of the United States, may register it under this part if he complies with §§ 47.3, 47.7, 47.8, 47.9, 47.11, 47.13, 47.15, and 47.17, as applicable and submits with his application an Aircraft Bill of Sale, AC Form 8050–2, signed by the seller or an equivalent conveyance, or other evidence of ownership authorized by § 47.11.

* * * * *

■ 13. Amend § 47.37 by revising the introductory language of paragraph (a) and paragraphs (a)(2) and (a)(3) to read as follows:

§ 47.37 Aircraft last previously registered in a foreign country.

(a) A person who is the owner of an aircraft last previously registered under the law of a foreign country may register it under this part if the owner—

* * * * *

(2) Submits with his application a bill of sale from the foreign seller or other evidence satisfactory to the FAA that he owns the aircraft; and

(3) Submits evidence satisfactory to the FAA that—

(i) If the country in which the aircraft was registered has not ratified the Convention on the International Recognition of Rights in Aircraft (4 U.S.T. 1830), (the Geneva Convention), or the Convention on International Interests in Mobile Equipment, as modified by the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (the Cape Town Treaty), the foreign registration has ended or is invalid; or

(ii) If that country has ratified the Geneva Convention, but has not ratified the Cape Town Treaty, the foreign registration has ended or is invalid, and each holder of a recorded right against the aircraft has been satisfied or has consented to the transfer, or ownership in the country of export has been ended by a sale in execution under the terms of the Geneva Convention; or

(iii) If that country has ratified the Cape Town Treaty and the aircraft is subject to the Treaty, that the foreign registration has ended or is invalid, and that all interests ranking in priority have been discharged or that the holders of such interests have consented to the deregistration and export of the aircraft.

(iv) Nothing under (a)(3)(iii) affects rights established prior to the Treaty entering into force with respect to the country in which the aircraft was registered.

* * * * *

■ 14. Amend § 47.43 by revising paragraph (a)(4) to read as follows:

§ 47.43 Invalid registration.

(a) * * *

(4) The interest of the applicant in the aircraft was created by a transaction that was not entered into in good faith, but rather was made to avoid (with or without the owner's knowledge) compliance with 49 U.S.C. 44101–44104.

* * * * *

■ 15. Amend § 47.47 by revising it to read as follows:

§ 47.47 Cancellation of Certificate for export purpose.

(a) The holder of a Certificate of Aircraft Registration or the holder of an irrevocable deregistration and export request authorization recognized under the Cape Town Treaty and filed with FAA who wishes to cancel the Certificate for the purpose of export must submit to the FAA Aircraft Registry—

(1) A written request for cancellation of the Certificate describing the aircraft by make, model, and serial number, stating the U.S. identification number and the country to which the aircraft will be exported;

(2)(i) For an aircraft not subject to the Cape Town Treaty, evidence satisfactory to the FAA that each holder of a recorded right has been satisfied or has consented to the transfer; or

(ii) For an aircraft subject to the Cape Town Treaty, evidence satisfactory to the FAA that each holder of a recorded right established prior to the date the Treaty entered into force with respect to the United States has been satisfied or has consented to the transfer; and

(3) A written certification that all registered interests ranking in priority to that of the requestor have been discharged or that the holders of such interests have consented to the cancellation for export purposes.

(b) If the aircraft is subject to the Cape Town Treaty and an irrevocable deregistration and export request authorization has been filed with the FAA Aircraft Registry, the FAA Registry will honor a request for cancellation only if an authorized party makes the request.

(c) The FAA Aircraft Registry notifies the country to which the aircraft is to be exported of the cancellation.

■ 16. Revise § 47.65 to read as follows:

§ 47.65 Eligibility.

To be eligible for a Dealer's Aircraft Registration Certificate, a person must have an established place of business in the United States, must be substantially

engaged in manufacturing or selling aircraft, and must be a citizen of the United States, as defined by 49 U.S.C. 40102(a)(15).

PART 49—RECORDING OF AIRCRAFT TITLES AND SECURITY DOCUMENTS

■ 17. Revise the authority citation for part 49 to read as follows:

Authority: 4 U.S.T. 1830; Pub. L. 108–297, 118 Stat. 1095 (49 U.S.C. 40101 note, 49 U.S.C. 44101 note); 49 U.S.C. 106(g), 40113–40114, 44101–44108, 44110–44113, 44704, 44713, 45302, 46104, 46301.

■ 18. Amend § 49.1 by revising paragraphs (a)(1) and (a)(4) to read as follows:

§ 49.1 Applicability.

(a) * * *

(1) Any aircraft registered under 49 U.S.C. 44101–44104;

* * * * *

(4) Any aircraft engine, propeller, or appliance maintained by or for an air carrier certificated under 49 U.S.C. 44705, for installation or use in an aircraft, aircraft engine, or propeller, or any spare part, maintained at a designated location or locations by or for such an air carrier.

* * * * *

■ 19. Revise § 49.11 to read as follows:

§ 49.11 FAA Aircraft Registry.

To be eligible for recording, a conveyance must be mailed to the FAA Aircraft Registry, Department of Transportation, Post Office Box 25504, Oklahoma City, Oklahoma 73125–0504, or delivered to the Registry at 6425 S. Denning Ave., Oklahoma City, Oklahoma 73169.

■ 20. Revise § 49.13(c) to read as follows:

§ 49.13 Signatures and acknowledgements.

* * * * *

(c) No conveyance or other instrument need be acknowledged, as provided in 49 U.S.C. 44107(c), in order to be recorded under this part. The law of the place of delivery of the conveyance determines when a conveyance or other instrument must be acknowledged in order to be valid for the purposes of that place.

* * * * *

■ 21. Amend § 49.17 by revising paragraphs (a) and (d)(6) to read as follows:

§ 49.17 Conveyances recorded.

(a)(1) Each instrument recorded under this part is a ''conveyance'' within the following definition in 49 U.S.C. 40102(a)(19):

''Conveyance'' means an instrument, including a conditional sales contract, affecting title to, or an interest in, property.

(2) A notice of Federal tax lien is not recordable under this part, since it is required to be filed elsewhere by the Internal Revenue Code (26 U.S.C. 6321, 6323; 26 CFR 301.6321–1, 301.6323–1).

* * * * *

(d) * * *

(6) A contract of conditional sale, as defined in 49 U.S.C. 40102(a)(18), must be signed by all parties to the contract.

■ 22. Amend § 49.33 by revising paragraph (d) to read as follows:

§ 49.33 Eligibility for recording: general requirements.

* * * * *

(d) It affects aircraft registered under 49 U.S.C. 44101–44104; and

* * * * *

■ 23. Amend § 49.41 by revising paragraph (a) to read as follows:

§ 49.41 Applicability.

* * * * *

(a) Any lease, a notice of tax lien or other lien (except a notice of Federal tax lien referred to in § 49.17(a)), and any mortgage, equipment trust, contract of conditional sale, or other instrument executed for security purposes, which affects title to, or any interest in, any specifically identified aircraft engine of 550 or more rated takeoff horsepower, or the equivalent of that horsepower, or a specifically identified aircraft propeller capable of absorbing 750 or more rated takeoff shaft horsepower.

* * * * *

■ 24. Amend § 49.51 by revising paragraph (a) to read as follows:

§ 49.51 Applicability.

* * * * *

(a) Any lease, a notice of tax lien or other lien (except a notice of Federal tax lien referred to in § 49.17 (a), and any mortgage, equipment trust, contract of conditional sale, or other instrument executed for security purposes, which affects title to, or any interest in, any aircraft engine, propeller, or appliance maintained by or on behalf of an air carrier certificated under 49 U.S.C. 44705 for installation or use in aircraft, aircraft engines, or propellers, or any spare parts, maintained at a designated location or locations by or on behalf of such an air carrier.

* * * * *

■ 25. Revise § 49.53(a)(1) to read as follows:

§ 49.53 Eligibility for recording: general requirements.

(a) * * *

(1) It affects any aircraft engine, propeller, appliance, or spare part, maintained by or on behalf of an air carrier certificated under 49 U.S.C. 44705;

* * * * *

■ 26. Add new subpart F to read as follows:

Subpart F—Transmission of Information to the International Registry

Sec.

49.61 Applicability.

49.63 Eligibility for Authorization for Transmission to the International Registry: General Requirements.

§ 49.61 Applicability.

The FAA Civil Aviation Registry is designated under Section 3 of the Cape Town Treaty Implementation Act of 2004, as the entry point for authorizing the transmission of information to the International Registry affecting United States civil aircraft, aircraft assigned a U.S. registration number and engines with a rated shaft horsepower of 550 or the equivalent thereof. This subpart applies to the transmission of information to the International Registry; the filing of the Entry Point filing form, AC Form 8050–135; and the filing of documents eligible for recording under subparts C and D of part 49.

§ 49.63 Eligibility for Authorization for Transmission to the International Registry: general requirements.

(a) To send information to the International Registry with respect to a civil aircraft of the United States, an aircraft for which a U.S. identification number has been assigned, or an aircraft engine, a person requesting a unique authorization code from the FAA Aircraft Registry must comply with the following:

(1) File a completed AC Form 8050–135 with the FAA Aircraft Registry; and

(2) For civil aircraft of the United States, file with the FAA Aircraft Registry any documents representing the transaction that meet the requirements of subpart C of this part; or

(3) For aircraft engines, file with the FAA Aircraft Registry any documents representing the transaction that meet the requirements of subpart D of this part.

(b) Nothing in this section requires transmittal of information relating to aircraft engines to the International

Registry through the FAA Aircraft Registry.

Marion C. Blakey,

Administrator.

[FR Doc. 04–28388 Filed 12–28–04; 11:37 am]

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Rules and Regulations

Federal Register
Vol. 70, No. 1
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FEDERAL ELECTION COMMISSION

11 CFR Part 111

[Notice 2004—20]

Statement of Policy Regarding Treasurers Subject to Enforcement Proceedings

AGENCY: Federal Election Commission.

ACTION: Statement of policy.

SUMMARY: The Commission is issuing a Policy Statement to clarify when, in the course of an enforcement proceeding (known as a Matter Under Review or ''MUR''), a treasurer is subject to Commission action in his or her official or personal capacity, or both. Under this policy, when the Commission investigates alleged violations of the Federal Election Campaign Act, as amended, the Presidential Election Campaign Fund Act, and the Presidential Primary Matching Payment Account Act (collectively ''the Act'' or ''FECA'') involving a political committee, the treasurer will typically be subject to Commission action only in his or her official capacity. However, when information indicates that a treasurer has knowingly and willfully violated a provision of the Act or regulations, or has recklessly failed to fulfill duties specifically imposed on treasurers by the Act, or has intentionally deprived himself or herself of the operative facts giving rise to the violation, the Commission will consider the treasurer to have acted in a personal capacity and make findings (and pursue conciliation) accordingly. This Policy Statement also addresses situations in which treasurers are subject to Commission action in both their official and personal capacities, and situations where successor treasurers are named.

The goal in adopting this policy is to clarify when a treasurer is subject to Commission action in a personal or official capacity, while at the same time preserving the Commission's ability to obtain an appropriate remedy that will satisfactorily resolve enforcement matters, or to seek relief in court, if necessary, against a live person. Importantly, the policy is grounded in the statutory obligations specifically imposed on treasurers and well-established legal distinctions between official and personal capacity proceedings.

DATES: December 16, 2004.

FOR FURTHER INFORMATION CONTACT: Peter G. Blumberg, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

SUPPLEMENTARY INFORMATION:

I. Introduction

The Commission is modifying its current practices to specify more clearly when a treasurer is subject to a Commission enforcement proceeding in his or her ''official'' and/or ''personal'' capacity.[1] Specifically, when a complaint asserts sufficient allegations to warrant naming a political committee as a respondent, the committee's current treasurer will also be named as a respondent in his or her official capacity. In these circumstances, reason-to-believe and probable cause findings against the committee will also be accompanied by findings against the current treasurer in his or her official capacity. When the complaint asserts allegations that involve a past or present treasurer's violation of obligations that the Act or regulations impose specifically on treasurers, then that treasurer may, in the circumstances described below, be named in his or her personal capacity, and findings may be made against the treasurer in that capacity. Thus, in some matters the current treasurer could be named in both official and personal capacities. Maintaining the Commission's ability to pursue a treasurer as a respondent in either official or personal capacity allows the Commission discretion to fashion an appropriate remedy for violations of the Act.[2]

Notably, political committees are artificial entities that can act only through their agents, such as their treasurers, and often can be, by their very nature, ephemeral entities that may exist for all practical purposes for a limited period, such as during a single election cycle. Due to these characteristics, identifying a live person who is responsible for representing the committee in an enforcement action is particularly important. Without a live person to provide notice to and/or to attach liability to, the Commission may find itself at a significant disadvantage in protecting the public interest and in ensuring compliance with the laws it is responsible for enforcing. By virtue of their authority to disburse funds and file disclosure reports and to amend those reports, treasurers of committees are in the best position to carry out the requirements of a conciliation agreement such as paying a civil penalty, refunding or disgorging contributions, and amending reports.

The Act designates treasurers to play a unique role in a political committee; indeed, a treasurer is the only office a political committee is required to fill. 2 U.S.C. 432(a). Without a treasurer, committees cannot undertake the host of activities necessary to carry out their mission, including receiving and disbursing funds and publicly disclosing their finances in periodic reports filed with the Commission. *Id.*; 2 U.S.C. 434(a)(1). Given this statutory role, especially the authority to receive and disburse funds (*e.g.,* pay a civil penalty, refund improper contributions, disgorge ill-gotten funds) on behalf of the committee, designating the treasurer as the representative of the committee for purposes of compliance with the Act makes sense.

Although the Commission may be entitled to take action as to a treasurer in both an official and individual capacity, in the typical enforcement matter the Commission expects that it will proceed against treasurers only in their official capacities. However, the Commission will consider treasurers parties to enforcement proceedings in their personal capacities where information indicates that the treasurer

[1] The terms ''official capacity'' and ''representative capacity'' are generally interchangeable, as are the terms ''personal capacity'' and ''individual capacity.'' *See McCarthy* v. *Azure,* 22 F.3d 351, 359 n.12 (1st Cir. 1994).

[2] In any scenario, the Commission will, of course, remain free to exercise its prosecutorial discretion not to pursue a respondent. For example, the Commission, in some cases, may decide not to pursue a predecessor treasurer who technically has personal liability where the committee, through its current treasurer, has agreed to pay a sufficient civil penalty and to cease and desist from further violations of the Act.

knowingly and willfully violated an obligation that the Act or regulations specifically impose on treasurers or where the treasurer recklessly failed to fulfill the duties imposed by law, or where the treasurer has intentionally deprived himself or herself of the operative facts giving rise to the violation. In these circumstances, the Commission may decide to find reason to believe the treasurer has violated the Act in his or her personal capacity, as well as finding reason to believe the committee violated the Act.

This statement of policy is intended to provide clearer notice to respondents and the public as to the nature of the Commission's enforcement actions, improve the perception of fairness throughout the regulated community, and merge the Commission's treasurer designation into conceptually familiar legal principles for the federal judiciary.[3] The statement first surveys the law on the official/personal capacity distinction; next, addresses when the Commission will proceed as to treasurers in their official or personal capacity or both; and finally, resolves the reoccurring issues of successor treasurers and substitution.

The Commission's Proposed Statement of Policy Regarding Naming of Treasurers in Enforcement Matters was published in the January 28, 2004, **Federal Register.** 69 FR 4092 (January 28, 2004). One comment was received. The commenter stated that the Commission's effort to clarify its treasurer naming policy is welcome, but he made several recommendations for how the Commission could assist treasurers to better understand their potential personal liability, such as requiring separate notices in instances where a treasurer was named in his or her individual and official capacities, and by enacting the policy's proposals through a rulemaking, rather than a policy statement. The commenter's suggestions were considered, but in order to allow the Commission to retain flexibility in processing its cases, and because the policy statement combined with existing laws and Commission regulations provide sufficient notice to treasurers of their responsibilities, the suggested changes were not implemented.

[3] As discussed *infra* Part II., the phrases ''official capacity'' and ''personal capacity'' are legal terms of art that permeate such field as sovereign immunity, bankruptcy, corporations, and federal procedure. Their usage instantaneously identifies for the judiciary when the Commission is pursuing treasurers by virtue of their position, rather than by product of their actions.

II. The Official/Personal Capacity Distinction

In the seminal case of *Kentucky* v. *Graham,* 473 U.S. 159 (1985), the United States Supreme Court discussed the distinction between official capacity and personal capacity suits. The Court determined that a suit against an officer in her official capacity ''generally represent[s] only another way of pleading an action against an entity of which an officer is an agent.'' *Id.* at 165. In other words, an official capacity proceeding ''is not a suit against the official but rather is a suit against the official's office.'' *Will* v. *Mich. Dept. of State Police,* 491 U.S. 58, 71 (1989). Accordingly, ''an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity.'' *Graham,* 473 U.S. at 166. Therefore, in an official capacity suit, the plaintiff seeks a remedy from the entity, not the particular officer personally.

A ''personal-capacity action is * * * against the individual defendant, rather than * * * the entity that employs him.'' *Id.* at 167'68. Since a ''[p]ersonal-capacity suit[] seek[s] to impose personal liability upon'' a particular individual, the individual is the true party in interest. *Id.* Liability lies with the particular officer personally, not with the officer's position. *See id.* at 166 n.11 (''Should the official die pending final resolution of a personal-capacity action, the plaintiff would have to pursue his action against the decedent's estate.''); *see also Hafer* v. *Melo,* 502 U.S. 21, 27 (1991) (''officers sued in their personal capacity come to court as individuals'').

The ''distinction between claims aimed at a defendant in his individual as opposed to representative capacity can be found across the law.'' *McCarthy,* 22 F.3d at 360 (citing numerous Supreme Court, lower court, and state cases referencing differences between individual and official capacity claims in multiple fields of law).[4] The official capacity/individual capacity distinction also carries societal significance. As the *McCarthy* court explained:

> The ubiquity of the [official capacity/individual capacity] distinction is a reflection of the reality that individuals in our complex society frequently act on behalf of other parties—a reality that often makes it unfair to credit or blame the actor, individually, for such acts. At the same time, the law strikes a wise balance by refusing automatically to saddle a principal with total responsibility for a representative's conduct, come what may, and by declining mechanically to limit an injured party's recourse to the principal alone, regardless of the circumstances.
>
> *Id.*

[4] *See Graham,* 473 U.S. at 165 (42 U.S.C. 1983); *Stafford* v. *Briggs,* 444 U.S. 527, 544 (1980) (venue determination); *Ex Parte Young,* 209 U.S. 123, 159 (1908) (Eleventh Amendment); *Northeast Fed. Credit Union* v. *Neves,* 837 F.2d 531, 534 (1st Cir. 1988) (jurisdictional purposes); *Pelkoffer* v. *Deer,* 144 B.R. 282, 285–86 (W.D. Pa. 1992) (bankruptcy); *Estabrook* v. *Wetmore,* 529 A.2d 956, 958 (N.H. 1987) (applying doctrine that acts of a corporate employee performed in his corporate capacity generally do not form the basis for personal jurisdiction over him in his individual capacity).

III. Treasurers in Their Official Capacity

Clearly indicating that the current treasurer is a party to an enforcement proceeding in his or her official capacity will improve the Commission's enforcement of the law in a number of ways. Most importantly, it clarifies that findings by the Commission (whether ''Reason To Believe'' or ''Probable Cause To Believe'') or the signing of a conciliation agreement only concerns the treasurer in his or her capacity as representative of the committee, not personally. The practice also ensures that a named individual who signs the conciliation agreement on behalf of the committee (or obtains legal representation on behalf of the committee) is the one empowered by law to disburse committee funds to pay a civil penalty, disgorge funds, make refunds, and carry out other monetary remedies that the committee agrees to through the conciliation agreement.[5] Also, naming a treasurer (in his or her official capacity), as opposed to naming simply the office of treasurer or just the committee, not only provides the Commission with an individual in every instance to serve with notices throughout the proceeding, but also results in more accountability on behalf of the committee—that is, a particular person who will ensure that a committee is responsive to Commission findings.[6] Finally, specifying whether a treasurer is a party to an enforcement proceeding in his or her official or personal capacity is consistent with use of these terms as pleading conventions in court actions. A probable cause finding against a treasurer in his or her official capacity makes clear to a district court in enforcement litigation that the Commission is seeking relief against the committee, and would only entitle the

[5] In the absence of a treasurer, ''the financial machinery of the campaign grinds to a halt * * *'' *FEC* v. *Toledano,* 317 F.3d 939, 947 (9th Cir. 2003), *reh'g denied; see* 2 U.S.C. 432(a) (''No expenditure shall be made * * * without the authorization of the treasurer or *his or her* designated agent.''); 11 CFR 102.7(a) (designation of assistant treasurer).

[6] Such accountability may be especially helpful in matters involving committees that tend to be ephemeral—existing for only a short time before permanently disbanding operations.

Commission to obtain a civil penalty from the committee. See Graham, 473 U.S. at 165.

IV. Treasurers in Their Personal Capacities

The Act places certain legal obligations on committee treasurers, the violation of which makes them personally liable.[7] *See, e.g.,* 2 U.S.C. 432(c) (keep an account of various committee records), 432(d) (preserve records for three years), 434(a)(1) (file and sign reports of receipts and disbursements). The Commission's regulations further require treasurers to examine and investigate contributions for evidence of illegality. *See* 11 CFR 103.3. Due to their ''pivotal role,'' treasurers may be held personally liable for failing to fulfill their responsibilities under the Act and the Commission's regulations. *See Toledano,* 317 F.3d at 947 (''The Act requires every political committee to have a treasurer, 2 U.S.C. 432(a), and holds him personally responsible for the committee's recordkeeping and reporting duties, id. 432(c)–(d), 434(a). * * * Federal law makes the treasurer responsible for detecting [facial contribution] illegalities, 11 CFR 103.3(b), and holds him personally liable if he fails to fulfill his responsibilities, see 2 U.S.C. 437g(d) . * * *''); *see also FEC* v. *John A. Dramesi for Cong. Comm.,* 640 F. Supp. 985 (D.N.J. 1986) (holding treasurer responsible for failing to ''make * * * best efforts to determine the legality of'' an excessive contribution); *FEC* v. *Gus Savage for Cong. '82 Comm.,* 606 F. Supp. 541, 547 (N.D. Ill. 1985) (''It is the treasurer, and not the candidate, who becomes the named defendant in federal court, and subjected to the imposition of penalties ranging from substantial fines to imprisonment.''); 104.14(d) (''Each treasurer of a political committee, and any other person required to file any report or statement under these regulations and under the Act shall be personally responsible for the timely and complete filing of the report or statement and for the accuracy of any information or statement contained in it.'').

Thus, a treasurer may be named as a respondent in a Matter Under Review in his or her personal capacity, and findings may be made against a treasurer in the same capacity, when the MUR involves the treasurer's violation of a legal obligation that the statute or regulations impose specifically on committee treasurers or when a reasonable inference from the alleged violation is that the treasurer knew, or should have known, about the facts constituting a violation.[8] In practice, however, the Commission intends to consider a treasurer the subject of an enforcement proceeding in his or her personal capacity only when available information (or inferences fairly derived therefrom) indicates that the treasurer had knowledge that his or her conduct violated a duty imposed by law, or where the treasurer recklessly failed to fulfill his or her duties under the act and regulations, or intentionally deprived himself or herself of facts giving rise to the violations. If, at any time in the proceeding, the Commission is persuaded that the treasurer did not act with the requisite state of mind, subsequent findings against the treasurer will only be made in his or her official capacity.[9]

Should the Commission file suit in district court following a finding of probable cause against a treasurer in his or her personal capacity, judicial relief, including an injunction and payment of a civil penalty, could be obtained against the treasurer personally. *Graham,* 473 U.S. at 166–168. Likewise, when the Commission obtains relief from a treasurer personally, the obligation will follow the individual. Thus, when a treasurer in his or her personal capacity agrees to pay a civil penalty through a conciliation agreement, or is ordered to pay a civil penalty by a district court, a personal obligation exists to pay the civil penalty. (A separate civil penalty would likely be assessed against the committee itself.) Likewise, a cease and desist provision (negotiated through conciliation) or an injunction (imposed by a district court) against a treasurer in his or her personal capacity will still apply to that treasurer in the event he or she subsequently becomes treasurer with another committee. *Cf. Sec'y Exch. Comm'n* v. *Coffey,* 493 F.2d 1304, 1311 n.11 (6th Cir. 1974) (''The significance of naming an officer * * * personally is that 'otherwise he is bound only as long as he remains an officer * * *, whereas if he is named [personally] he is personally enjoined without limit of time.' '') (quoting 6 L. Loss, *Securities Regulation* 4113 (1969, supp. to 2d ed.)).

V. Treasurers in Both Capacities

There will likely be cases in which the treasurer is subject to Commission action in both his or her official and personal capacity, as explained in *supra* sections III. and IV. In such cases, the Commission will clearly designate that the findings are being made against the treasurer in both capacities. *See, e.g., United States* v. *Johnson,* 541 F.2d 710, 711 (8th Cir. 1976) (applying a similar standard in an action involving the Federal Trade Commission when finding that ''[t]he propriety of including a person both as an individual and as a corporate officer in a cease and desist order has consistently been upheld in instances where the person included was instrumental in formulating, directing and controlling the acts and practices of the corporation'') (citing *Fed. Trade Comm'n* v. *Standard Ed. Soc'y,* 302 U.S. 112 (1937); *Standard Distrib.* v. *Fed. Trade Comm'n,* 211 F.2d 7 (2d Cir. 1954); *Benrus Watch Co.* v. *Fed. Trade Comm'n,* 352 F.2d 313 (8th Cir. 1965)).

For example, if a complaint alleges a violation such as coordination or receipt of contributions in the name of another, the Commission intends initially to name the treasurer as a respondent only in his or her official capacity. Notably, in these cases the reporting violation stems from the same operative facts as the principal violation. Only if the Commission learns later that the treasurer had knowledge of the operative facts—for example, the treasurer knew that an in-kind contribution stemming from coordination went unreported—or acted recklessly, or intentionally deprived himself or herself of the relevant facts, might the Commission make findings

[7] If a past or present treasurer violates a prohibition that applies generally to individuals, the treasurer may be named as a respondent in his or her personal capacity, and findings may be made against the treasurer in that capacity. In this way, a treasurer would be treated no differently than any other individual who violates a provision of the Act. The Act and the Commission's regulations apply to any ''person,'' which includes individuals. *See, e.g.*, 2 U.S.C. 432(b) (forward contributions to the committee's treasurer), 441e (receipt of contributions from foreign nationals), and 441f (making and knowingly accepting contributions in the name of another).

[8] Indeed, if FECA were construed to impose liability on treasurers only in their official capacities, it would effectively mean that only committees are liable for violations under the statute—which would have been easy enough for Congress to accomplish by writing the Act to impose reporting, recordkeeping, and other duties on ''committees'' rather than ''treasurers.'' In fact, in some instances, the Act and the Commission's regulations specifically impose obligations on committees and committee officers and candidates. *See, e.g.,* 2 U.S.C. 441a(f) (receipt of excessive contributions), 11 CFR 104.7(b) (best efforts).

[9] Conversely, when a reason-to-believe finding is made against a treasurer in his or her official capacity only, but the potential violations at issue involve obligations specifically imposed by the Act or regulations on treasurers, the notice of the finding will be accompanied by a letter advising that the Commission could later decide to pursue the treasurer in a personal capacity if information shows that the treasurer knowingly and willfully violated the Act, or recklessly failed to fulfill the duties imposed by law, or intentionally deprived himself or herself of the operative facts giving rise to the violation.

against the treasurer in his or her personal capacity.

In cases where the treasurer is subject to Commission action in both official and personal capacities, the respondents could be named as ''John Doe for Congress and Joe Smith, in his official capacity as treasurer and in his personal capacity.'' Alternatively, the respondents could be named as ''John Doe for Congress and Joe Smith, in his official capacity as treasurer'' and ''Joe Smith, in his personal capacity.'' Regardless of the form of the notification, where a treasurer has been named in both his or her official and personal capacities, any resulting conciliation agreement would be signed by the treasurer on behalf of both the committee and the treasurer in his or her personal capacity.

VI. Successor Treasurers/Substitution

An issue closely related to the official/personal capacity distinction is whether a successor treasurer may be substituted for a predecessor treasurer in a matter under review. Often the specific individual who was the treasurer at the time of a violation is no longer the treasurer during the enforcement process. Whether the successor treasurer or the predecessor treasurer should be named as the respondent depends on whether the Commission is pursuing the treasurer in his or her official capacity, personal capacity, or both.

Currently, when OGC discovers that a committee has changed treasurers after the date of the activity on which the finding was based, OGC typically notes the change of treasurer, the date of the change, the former treasurer's name, and indicates whether an amendment was made to the Statement of Organization in OGC's next report to the Commission. If a treasurer change is made after a finding of reason to believe, then OGC typically includes the new treasurer and notes the change in its next report on the matter. If a treasurer change is made after a finding of probable cause to believe, OGC sends the new treasurer a supplemental probable cause brief (incorporating the prior probable cause brief), which states that the Commission found probable cause to believe against the committee and the treasurer's predecessor and will recommend probable cause against the new treasurer. After receiving a response or waiting until the expiration of the response period, OGC typically returns to the Commission with a recommendation as to the new treasurer.

When the Commission pursues a current treasurer in his or her official capacity, successor treasurers will be substituted for the predecessor treasurer. In such cases, the Commission is pursuing the official position (and, therefore, the entity), not the individual holding the position. *See Will,* 491 U.S. at 71. Because an official capacity action is an action against the treasurer's position, the Commission may summarily substitute a new treasurer in his or her official capacity at any stage prior to a finding of probable cause to believe.[10]

When a predecessor treasurer may be personally liable, the Commission could pursue the predecessor treasurer individually, and not substitute the successor treasurer for the predecessor treasurer individually. *See* fn. 7; *Graham,* 473 U.S. at 167–68. There would be no legal basis for imputing personal liability from a predecessor treasurer's misconduct to a successor treasurer who did not personally engage in the misconduct.

If the Commission were to pursue a treasurer both officially and personally and this treasurer is later replaced, the Commission could pursue the predecessor treasurer for any violations for which he or she is personally liable, and substitute the successor treasurer for official capacity violations. Absent some independent basis of liability, the Commission does not intend to pursue intermediate treasurers.[11] *See Cal. Democratic Party* v. *FEC,* 13 F. Supp. 2d 1031, 1037 (E.D. Cal. 1998) (dismissing individual capacity claims against a former treasurer because ''there is no allegation that [the treasurer] violated any personal obligation'' and dismissing official capacity claims against him ''since [he] is no longer treasurer * * * and thus, is not the appropriate person against whom an official capacity suit can be maintained. * * *'').[12]

VII. Conclusion

Effective as of the date this Policy Statement is published in the **Federal Register**, and as more fully explained above, the Commission will consider treasurers of political committees subject to enforcement proceedings as follows:

1. In enforcement proceedings where a political committee is a respondent, the committee's current treasurer will be subject to Commission action ''in (his or her) official capacity as treasurer.''

2. In enforcement proceedings where information indicates that a treasurer (past or present) of a political committee (a) knowingly and willfully violated the Act or regulations, (b) recklessly failed to fulfill the duties imposed by a provision of the Act or regulations that applies specifically to treasurers, or (c) intentionally deprived himself or herself of the operative facts giving rise to a violation, the treasurer may be subject to Commission action ''in (his or her) personal capacity.''

3. In enforcement proceedings where information indicates that a treasurer of a political committee is subject to findings in both an official and personal capacity (*i.e.*, information indicates that the committee's current treasurer violated the Act or regulations with the requisite state of mind described in #2 above), the current treasurer may be subject to Commission action in both an official and personal capacity.

4. When the Commission makes findings as to a treasurer in his or her official capacity, successor treasurers will be substituted as if the findings had been made as to the successor.

5. In enforcement proceedings involving provisions of the Act or regulations that apply generally to individuals (*e.g.*, prohibitions against the making of an excessive contribution), the treasurer will be subject to Commission action in his or her personal capacity the same as any other individuals.

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[10] Pursuant to the final policy, the Commission is not legally obligated to undertake the requirements of 2 U.S.C. 437g(a)(3) when a successor treasurer begins his or her position; although not legally required to do so, the Commission would intend to inform a new treasurer of the pending action and make copies of the briefs available to the successor treasurer.

[11] For example, while Treasurer A is the treasurer for Joe Smith for Congress, a violation occurs that subjects A to official liability and potentially to individual liability. Treasurer A would be named in his official capacity and notified in a reason-to-believe notification of the potential for personal liability. After the enforcement action has begun, Treasurer A resigns and Treasurer B takes over. The Commission would pursue Treasurer B in her official capacity, and if the circumstances warranted, Treasurer A in his individual capacity. If Treasurer B resigns and is succeeded by Treasurer C prior to the conclusion of the enforcement matter, the Commission would then continue to pursue Treasurer A in his individual capacity and pursue Treasurer C in her official capacity. Treasurer B would no longer be named in her official capacity.

[12] A deeper examination of the court file indicates that—despite the *California Democratic Party* court's assertion to the contrary—the Commission never actually pled that the treasurer in this case was personally liable. Rather, the complaint references the treasurer ''as treasurer'' and the Commission's response to the treasurer's motion to dismiss indicates that the Commission was pursuing the treasurer ''in his official capacity.'' Compl., paragraphs 8, 58–59, Prayer paragraphs 1–5; Resp. to Def. Mot. to Dismiss, p. 21. However, the court's statement in *California Democratic Party* underscores the need for the Commission to delineate more clearly the capacity in which it pursues treasurers.

Dated: December 23, 2004.

Bradley A. Smith,

Chairman, Federal Election Commission.

[FR Doc. 04–28668 Filed 12–30–04; 8:45 am]

BILLING CODE 6715–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2004–19969; Directorate Identifier 2004–SW–43–AD; Amendment 39–13923; AD 2004–26–11]

RIN 2120–AA64

Airworthiness Directives; Bell Helicopter Textron Canada Model 222, 222B, 222U, 230, and 430 Helicopters

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; request for comments.

SUMMARY: This amendment adopts a new airworthiness directive (AD) for the specified Bell Helicopter Textron (BHTC) model helicopters. This action requires certain checks and inspections of the tail rotor blades. If a crack is found, before further flight, this AD requires replacing the tail rotor blade (blade) with an airworthy blade. This amendment is prompted by three reports of cracked blades found during scheduled inspections. The actions specified in this AD are intended to detect a crack in the blade and prevent loss of a blade and subsequent loss of control of the helicopter.

DATES: Effective January 18, 2005.

Comments for inclusion in the Rules Docket must be received on or before March 4, 2005.

ADDRESSES: Use one of the following addresses to submit comments on this AD:

- DOT Docket Web site: Go to *http://dms.dot.gov* and follow the instructions for sending your comments electronically;
- Government-wide rulemaking Web site: Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically;
- Mail: Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590;
- Fax: (202) 493–2251; or
- Hand Delivery: Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

You may get the service information identified in this AD from Bell Helicopter Textron Canada, 12,800 Rue de l'Avenir, Mirabel, Quebec J7J1R4, telephone (450) 437–2862 or (800) 363–8023, fax (450) 433–0272.

Examining the Docket

You may examine the docket that contains the AD, any comments, and other information on the Internet at *http://dms.dot.gov*, or in person at the Docket Management System (DMS) Docket Offices between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Office (telephone (800) 647–5227) is located on the plaza level of the Department of Transportation Nassif Building at the street address stated in the **ADDRESSES** section. Comments will be available in the AD docket shortly after the DMS receives them.

FOR FURTHER INFORMATION CONTACT: Sharon Miles, Aviation Safety Engineer, FAA, Rotorcraft Directorate, Regulations and Guidance Group, Fort Worth, Texas 76193–0111, telephone (817) 222–5122, fax (817) 222–5961.

SUPPLEMENTARY INFORMATION: This amendment adopts a new AD for the specified BHTC model helicopters. This action requires certain checks and inspections of the blades. If a crack is found, before further flight, this AD requires replacing the blade with an airworthy blade. This amendment is prompted by three reports of cracked blades found during scheduled inspections. This condition, if not detected, could result in loss of a blade and subsequent loss of control of the helicopter.

Transport Canada, the airworthiness authority for Canada, notified the FAA that an unsafe condition may exist on the specified BHTC model helicopters. Transport Canada advises of the discovery of cracked blades during scheduled inspections on three occasions. Two cracks originated from the outboard feathering bearing bore underneath the flanged sleeves. The third crack started from the inboard feathering bearing bore. Investigation found that the cracks originated from either a machining burr or a corrosion site in the bearing bore underneath the flanged sleeves.

BHTC has issued Alert Service Bulletin (ASB) No. 222–04–100 for Model 222 and 222B helicopters, No. 222U–04–71 for Model 222U helicopters, No. 230–04–31 for Model 230 helicopters, and No. 430–04–31 for Model 430 helicopters, all dated August 27, 2004. The ASBs specify a repetitive visual inspection every 3 hours time-in-service (TIS) and a 50-hour inspection of the blade root end around the feathering bearings for a crack. Transport Canada classified these ASBs as mandatory and issued AD CF–2004–21, dated October 28, 2004, to ensure the continued airworthiness of these helicopters in Canada.

These helicopter models are manufactured in Canada and are type certificated for operation in the United States under the provisions of 14 CFR 21.29 and the applicable bilateral agreement. Pursuant to the applicable bilateral agreement, Transport Canada has kept the FAA informed of the situation described above. The FAA has examined the findings of Transport Canada, reviewed all available information, and determined that AD action is necessary for products of these type designs that are certificated for operation in the United States.

This unsafe condition is likely to exist or develop on other helicopters of the same type designs. Therefore, this AD is being issued to prevent loss of a blade and subsequent loss of control of the helicopter. This AD requires the following:

- Within 3 hours time-in-service (TIS), and at specified intervals, clean and visually check both sides of each blade for a crack in the area around the tail rotor feathering bearing. An owner/operator (pilot) may perform the check for cracked blades. Pilots may perform these checks because they require no tools, can be done by observation, and can be done equally well by a pilot or a mechanic. However, the pilot must enter compliance with these requirements into the helicopter maintenance records by following 14 CFR 43.11 and 91.417(a)(2)(v).
- Within 50 hours TIS and at specified intervals, clean and inspect both sides of each blade for a crack using a 10X or higher magnifying glass.
- If a crack is found even in the paint during a visual check or during a 50-hour TIS inspection, before further flight, a further inspection of the blade for a crack is required as follows:
- Remove the blade. Remove the paint to the bare metal in the area of the suspected crack by using Plastic Metal Blasting (PMB) or a nylon web abrasive pad and abrading the blade surface in a span-wise direction only.
- Using a 10X or higher power magnifying glass, inspect the blade for a crack.
- If a crack is found, before further flight, replace the blade with an airworthy blade.
- If no crack is found in the blade surface, refinish the blade by applying one coat of MIL–P–23377 or MIL–P–85582 Epoxy Polyamide Primer so that the primer overlaps the existing coats

just beyond the abraded area. Let the area dry for 30 minutes to 1 hour. Then, apply one sealer coat of Polyurethane MILC85285 TYI CL2, color Number 27925 (semi-gloss white) per Fed. Std. 595 and reinstall the blade.

The short compliance time involved is required because the previously described critical unsafe condition can adversely affect the controllability and structural integrity of the helicopter. Therefore, checking the blade within 3 hours TIS and at intervals not to exceed 3 hours TIS is required, and this AD must be issued immediately.

Since a situation exists that requires the immediate adoption of this regulation, it is found that notice and opportunity for prior public comment hereon are impracticable, and that good cause exists for making this amendment effective in less than 30 days.

We estimate that this AD will affect 156 helicopters and require:

• ¼ hour for a pilot check, assuming 200 a year; and 2 hours for a maintenance inspection, assuming 12 a year at an average labor rate of $65 per work hour;

• Parts cost at about $13,410 per helicopter, assuming one blade replacement a year. Based on these figures, the estimated total cost impact of the AD on U.S. operators is $2,842,320 per year.

Comments Invited

This AD is a final rule that involves requirements that affect flight safety and was not preceded by notice and an opportunity for public comment; however, we invite you to submit any written data, views, or arguments regarding this AD. Send your comments to an address listed under **ADDRESSES.** Include ''Docket No. FAA–2004–19969; Directorate Identifier 2004–SW–43–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the AD. We will consider all comments received by the closing date and may amend the AD in light of those comments.

We will post all comments we receive, without change, to *http://dms.dot.gov*, including any personal information you provide. We will also post a report summarizing each substantive verbal contact with FAA personnel concerning this AD. Using the search function of our docket Web site, you can find and read the comments to any of our dockets, including the name of the individual who sent the comment. You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78), or you may visit *http://dms.dot.gov.*

Regulatory Findings

We have determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that the regulation:

1. Is not a ''significant regulatory action'' under Executive Order 12866;

2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared an economic evaluation of the estimated costs to comply with this AD. See the DMS to examine the economic evaluation.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, Section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701, ''General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. Section 39.13 is amended by adding a new airworthiness directive to read as follows:

AD 2004–26–11 Bell Helicopter Textron Canada: Amendment 39–13923. Docket No. FAA–2004–19969; Directorate Identifier 2004–SW–43–AD.

Applicability: The following helicopter models, identified by serial number and with the following part number (P/N) tail rotor blade (blade), installed, certificated in any category.

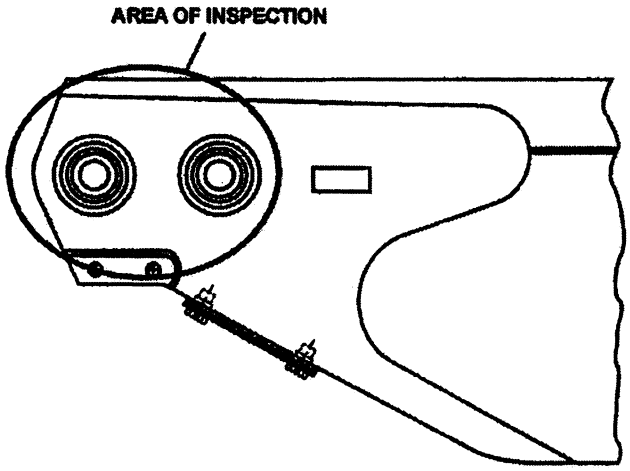
Model	Serial No.	Blade P/N
222	47006 through 47089	222–016–001–123, –127, –131, and –135.
222B	47131 through 47156	222–016–001–123, –127, –131, and –135.
222U	47501 through 47574	222–016–001–123, and –131.
230	23001 through 23038	222–016–001–123, and –131.
430	49001 through 49105	222–016–001–123, and –131.

Compliance: Required as indicated.

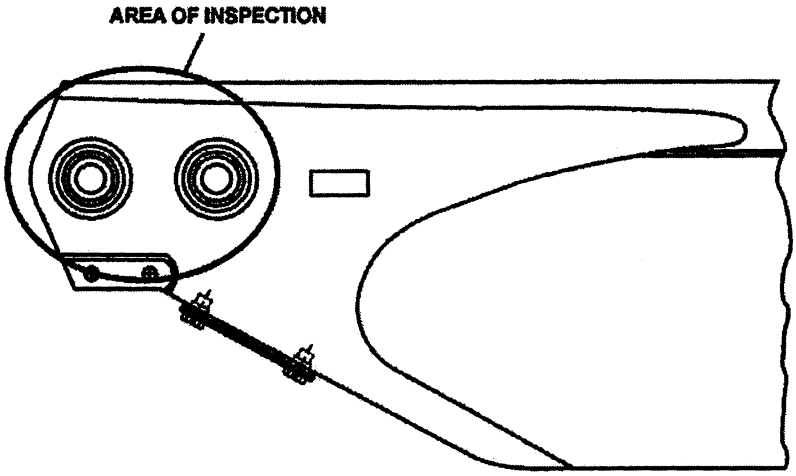
To detect a crack in the blade and prevent loss of the blade and subsequent loss of control of the helicopter, accomplish the following:

(a) Within 3 hours time-in-service (TIS) and at intervals not to exceed 3 hours TIS, clean and visually check both sides of each blade for a crack in the paint in the areas shown in Figure 1 of this AD. An owner/operator (pilot), holding at least a private pilot certificate, may perform this visual check and must enter compliance with this paragraph into the helicopter maintenance records by following 14 CFR sections 43.11 and 91.417(a)(2)(v).

BILLING CODE 4910–13–P



222-016-001-123 and -127



222-016-001-131 and -135

Figure 1. Blade inspection area

BILLING CODE 4910–13–C

Note 1: Bell Helicopter Textron Alert Service Bulletins 222–04–100, 222U–04–71, 230–04–31, and 430–04–32, all dated August 27, 2004, pertain to the subject of this AD.

(b) If a crack is found in the paint while complying with paragraph (a) of this AD, before further flight, inspect the blade by removing the blade and by abrading the area and following the other requirements in paragraph (c) of this AD.

(c) Within the next 50 hours TIS, unless accomplished previously, and at intervals not to exceed 50 hours TIS, clean the blade by wiping down both surfaces of each blade in the inspection area depicted in Figure 1 of this AD using aliphatic naptha (C–305) or detergent (C–318) or equivalents. Using a 10X or higher power magnifying glass, visually inspect both sides of the blade in the areas depicted in Figure 1 of this AD.

(1) If even a crack is found in the paint, before further flight, remove the blade.

(2) Remove the paint to the bare metal in the area of the suspected crack by using Plastic Metal Blasting (PMB) or a nylon web abrasive pad. Abrade the blade surface in a span-wise direction only.

Note 2: PMB may cause damage to helicopter parts if performed by untrained personnel. BHT–ALL–SPM, chapter 3, paragraph 3–24 pertains to the subject of this AD.

(3) Using a 10X or higher power magnifying glass, inspect the blade for a crack.

(i) If a crack is found, before further flight, replace the blade with an airworthy blade.

(ii) If no crack is found in the blade surface, refinish the blade by applying one coat of MIL–P–23377 or MIL-P–85582 Epoxy Polyamide Primer so that the primer overlaps

the existing coats just beyond the abraded area. Let the area dry for 30 minutes to 1 hour. Then, apply one sealer coat of Polyurethane MILC85285 TYI CL2, color Number 27925 (semi-gloss white) per Fed. Std. 595. Reinstall the blade.

Note 3: BHT–ALL–SPM, chapter 4, pertains to painting.

(d) To request a different method of compliance or a different compliance time for this AD, follow the procedures in 14 CFR 39.19. Contact the Safety Management Group, FAA, for information about previously approved alternative methods of compliance.

(e) Special flight permits may be issued by following 14 CFR 21.197 and 21.199 to operate the helicopter to a location where the requirements of this AD can be accomplished provided you do not find a crack in the paint during a check or inspection.

(f) This amendment becomes effective January 18, 2005.

Note 4: The subject of this AD is addressed in Transport Canada (Canada) Airworthiness Directive CF–2004–21, dated October 28, 2004.

Issued in Fort Worth, Texas, on December 23, 2004.

Kim Smith,

Acting Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 04–28628 Filed 12–30–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2002–NM–182–AD; Amendment 39–13882; AD 2004–24–06]

RIN 2120–AA64

Airworthiness Directives; Saab Model SAAB SF340A and SAAB 340B Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; correction.

SUMMARY: This document corrects a typographical error that appeared in airworthiness directive (AD) 2004–24–06 that was published in the **Federal Register** on November 30, 2004 (69 FR 69505). The typographical error resulted in incorrect reference to certain main landing gear (MLG) part numbers as retract actuator bracket attachment bolt (RABAB) part numbers. This AD is applicable to certain Saab Model SAAB SF340A and SAAB 340B series airplanes. This AD requires replacement of the RABAB of the MLG with a new RABAB; reidentification of the MLG shock strut; an inspection for corrosion, fretting, or other damage of certain RABABs; and applicable corrective actions.

DATES: Effective January 4, 2005.

FOR FURTHER INFORMATION CONTACT: Dan Rodina, Aerospace Engineer; International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–2125; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION: Airworthiness Directive (AD) 2004–24–06, amendment 39–13882, applicable to certain Saab Model SAAB SF340A and SAAB 340B series airplanes, was published in the **Federal Register** on November 30, 2004 (69 FR 69505). That AD requires replacement of the retract actuator bracket attachment bolt (RABAB) of the main landing gear (MLG) with a new RABAB; reidentification of the MLG shock strut; an inspection for corrosion, fretting, or other damage of certain RABABs; and applicable corrective actions.

As published, the AD contains an incorrect reference to the old RABAB part number. Instead of the RABAB part number, certain MLG assembly part numbers were listed as RABAB part numbers.

Since no other part of the regulatory information has been changed, the final rule is not being republished in the **Federal Register**.

The effective date of this AD remains January 4, 2005.

§ 39.13 [Corrected]

■ In the **Federal Register** of November 30, 2004, on page 69506, make the following corrections:

■ 1. In the first column, following instruction 2, the airworthiness directive number ''2004–24–067'' is corrected to read ''2004–24–06'';

■ 2. In the second column, paragraph (c) of this AD 2004–24–06 is corrected to read as follows:

* * * * *

(c) As of the effective date of this AD, no person may install a MLG shock strut, part number (P/N) AIR83022–5 through –18 inclusive, or P/N AIR83064–1 through –5 inclusive, on any airplane; and no person may install a RABAB, P/N AIR124792, on any MLG shock strut.

* * * * *

Issued in Renton, Washington, on December 21, 2004.

Kevin M. Mullin,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–28653 Filed 12–28–04; 1:42 pm]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2000–NM–409–AD; Amendment 39–13853; AD 2004–22–25]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 767–200, –300, and –300F Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; correction.

SUMMARY: This document corrects an error that appeared in airworthiness directive (AD) 2004–22–25, which was published in the **Federal Register** on November 9, 2004 (69 FR 64839). The error resulted in the incorrect reference to cable spacers. This AD is applicable to certain Boeing Model 767–200, –300, and –300F series airplanes. This AD requires a one-time inspection for discrepancies of all wire bundles, including certain power feeder cables, of the electrical system in the forward cargo compartment ceiling at certain stations; and corrective actions if necessary.

DATES: Effective December 14, 2004.

FOR FURTHER INFORMATION CONTACT: Elias Natsiopoulos, Aerospace Engineer, Systems and Equipment Branch, ANM–130S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 917–6478; fax (425) 917–6590.

SUPPLEMENTARY INFORMATION: Airworthiness Directive (AD) 2004–22–25, amendment 39–13853, applicable to certain Boeing Model 767–200, –300, and –300F series airplanes, was published in the **Federal Register** on November 9, 2004 (69 FR 64839). That AD requires a one-time inspection for discrepancies of all wire bundles, including certain power feeder cables, of the electrical system in the forward cargo compartment ceiling at certain stations; and corrective actions if necessary.

As published, the third cell of paragraph (a)(2)(ii) of Table 1 of AD 2004–22–25 states, ''* * * install sleeving, lacing tape, cable spacers, and straps,'' in accordance with Boeing Alert Service Bulletin 767–24A0128, Revision 3, dated June 24, 2004 (cited as the appropriate service information for accomplishing the required actions). We incorrectly specified ''cable spacers'' as part of the installation requirements if the clearance between the power feeder cables and cargo liner standoffs is less

than 0.13 inch. The service bulletin does not describe procedures for installation of cable spacers in that area. Therefore, we have determined that ''cable spacers'' should be removed from the requirements of paragraph (a)(2)(ii) of Table 1 of that AD.

Since no other part of the regulatory information has been changed, the final rule is not being republished in the **Federal Register**.

The effective date of this AD remains December 14, 2004.

§ 39.13 [Corrected]

■ On page 64842, in Table 1, paragraph (a)(2)(ii) of AD 2004–22–25 is corrected to read as follows:

* * * * *

TABLE 1.—CLEARANCE BETWEEN WIRE BUNDLES AND CARGO LINER STANDOFFS

If the clearance between the—	Is—	Then—
(i) Wire bundles and cargo liner standoffs	0.25 inch or more	No further action is required by this AD.
	Between 0.13 and 0.25 inch	Install sleeving and lacing tape.
	Less than 0.13 inch	Install sleeving, lacing tape, cable spacers, and straps.
(ii) Power feeder cables and cargo liner standoffs	0.13 inch or more	No further action is required by this AD.
	less than 0.13 inch	Install sleeving, lacing tape, and straps.

* * * * *

Issued in Renton, Washington, on December 22, 2004.

Kevin M. Mullin,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–28666 Filed 12–30–04; 8:45 am]

BILLING CODE 4910–13–P

SOCIAL SECURITY ADMINISTRATION

20 CFR Parts 404, 408 and 416

[Regulations No. 4, 8, and 16]

RIN 0960–AG06

Expanded Authority for Cross-Program Recovery of Benefit Overpayments

AGENCY: Social Security Administration.

ACTION: Final rules with request for comment.

SUMMARY: To implement part of the Social Security Protection Act of 2004 (SSPA), we are revising our rules on the recovery of overpayments incurred under one of our programs from benefits payable to the overpaid individual under other programs we administer. Provisions of the SSPA expand the authority for cross-program recovery of overpayments made in our various programs. Implementation of these regulatory revisions when they become effective will yield significant program savings.

Although we are issuing these rules as final rules, we are also requesting comments on certain material changes from the proposed rules we previously published concerning expanded cross-program recovery. These changes would allow us to use cross-program recovery if: an individual is no longer receiving benefits under a particular program but is making regular monthly installments to refund an overpayment previously received under that program; or an individual is receiving monthly payments under a particular program and we are recovering a previous overpayment made under that program by adjusting the amount of those monthly benefits. We will not implement these changes before we consider comments which we receive by the date provided below and publish a document in the **Federal Register**. If we determine that any further changes in these sections are warranted, we will publish revised rules. See ''Additional Changes'' in the **SUPPLEMENTARY INFORMATION** section for further discussion.

DATES: These rules are effective January 3, 2005. We invite public comments on §§ 404.530(b), 408.930(b), and 416.572(b). To be sure that we consider your comments on these changes, we must receive them by February 2, 2005.

ADDRESSES: You may give us your comments by: using our Internet site facility (*i.e.*, Social Security Online) at *http://policy.ssa.gov/pnpublic.nsf/LawsRegs* or the Federal eRulemaking Portal at *http://www.regulations.gov;* e-mail to *regulations@ssa.gov;* telefax to (410) 966–2830; or letter to the Commissioner of Social Security, P.O. Box 17703, Baltimore, Maryland 21235–7703. You may also deliver them to the Office of Regulations, Social Security Administration, 100 Altmeyer Building, 6401 Security Boulevard, Baltimore, Maryland 21235–6401, between 8 a.m. and 4:30 p.m. on regular business days. Comments are posted on our Internet site at *http://policy.ssa.gov/pnpublic.nsf/LawsRegs* or you may inspect them on regular business days by making arrangements with the contact person shown in this preamble.

Electronic Version

The electronic file of this document is available on the date of publication in the **Federal Register** at *http://www.gpoaccess.gov/fr/index.html*. It is also available on the Internet site for SSA (*i.e.*, Social Security Online) at *http://policy.ssa.gov/pnpublic.nsf/LawsRegs.*

FOR FURTHER INFORMATION CONTACT: Richard Bresnick, Social Insurance Specialist, Office of Regulations, Social Security Administration, 100 Altmeyer Building, 6401 Security Boulevard, Baltimore, MD 21235–6401, (410) 965–1758 or TTY (410) 966–5609. For information on eligibility or filing for benefits, call our national toll-free number, 1–800–772–1213 or TTY 1–800–325–0778, or visit our Internet site, Social Security Online, at *http://www.socialsecurity.gov.*

SUPPLEMENTARY INFORMATION:

Background

Section 210 of the SSPA, Public Law 108–203, enacted on March 2, 2004, significantly expands our ability to recover overpayments made in one of our programs from benefits payable to the overpaid individual under other programs we administer. These programs are Social Security benefits under title II of the Social Security Act (the Act), Special Veterans Benefits (SVB) under title VIII of the Act and Supplemental Security Income (SSI) benefits under title XVI of the Act.

Prior to enactment of the SSPA, sections 808, 1147 and 1147A of the Act allowed cross-program adjustment to recover overpayments as follows:

- We could withhold no more than 10 percent of any title II benefit payment (*i.e.*, a current monthly payment and a past-due payment) to recover an SSI overpayment, if the person is not currently eligible for SSI;
- We could withhold any title II benefit payment to recover an SVB overpayment, if the person is not qualified for SVB;

• We could withhold no more than 10 percent of any SVB payment to recover an SSI overpayment, if the person is not currently eligible for SSI;

• We could withhold any SVB payment to recover a title II overpayment, if the person is not currently receiving title II benefits.

The Act did not allow us to withhold SSI payments to recover title II or SVB overpayments.

Section 210 of the SSPA repealed section 1147A and cross-program recovery provisions in section 808 of the Act and amended section 1147 to expand our cross-program recovery authority to allow recovery of an overpayment occurring under any of these programs from benefits or payments due in any other of these programs at a rate not to exceed 10 percent of the monthly benefit. It allows for unlimited withholding of past-due benefits in one program to recover an overpayment paid under another program. It also allows for cross-program recovery even if the individual is entitled under the program in which the overpayment was made.

Explanation of Changes

We are changing the regulations in 20 CFR parts 404, 408 and 416 to reflect the expanded cross-program recovery authority.

Currently, part 404 has no provisions permitting cross-program recovery. In part 404, we are adding new §§ 404.530, .535, .540, and .545, which parallel existing regulations at §§ 408.930 through 408.933, to include the expanded authority to recover title II overpayments as follows:

• We may withhold from a current monthly SSI payment no more than the lesser of that payment or 10 percent of the monthly income (as defined in the regulation) to recover a title II overpayment;

• We may withhold no more than 10 percent of current monthly SVB payments to recover a title II overpayment;

• We may withhold up to 100 percent of SSI and SVB past-due payments to recover a title II overpayment.

We are changing §§ 408.930 through 408.933 to reflect the expanded authority to recover title VIII overpayments as follows:

• We may withhold from a current monthly SSI payment no more than the lesser of that payment or 10 percent of the monthly income to recover an SVB overpayment;

• We may withhold no more than 10 percent of current monthly title II benefits to recover an SVB overpayment;

• We may withhold up to 100 percent of title II and SSI past-due payments to recover an SVB overpayment.

We are changing the regulations at § 416.570 to delete obsolete information. We are changing the regulations at § 416.572 and adding §§ 416.573, .574, and .575 to reflect the expanded authority to recover title XVI overpayments as follows:

• We may withhold no more than 10 percent of current monthly title II benefits to recover an SSI overpayment;

• We may withhold no more than 10 percent of current monthly SVB payments to recover an SSI overpayment;

• We may withhold up to 100 percent of title II and SVB past-due payments to recover an SSI overpayment.

The new sections follow the same structure as the existing regulations at §§ 408.930 through 408.933. We believe that this format is easy for members of the public to understand. We are removing the title II example from § 416.572 because the example illustrated how we applied the 10 percent limit to past-due title II benefits. Under the new law, this limitation no longer applies. We are removing the title VIII example from § 416.572 because we have added a cross-reference to the title VIII regulations that explain how title VIII benefits are computed.

We are removing from the SVB and SSI regulations the provisions that preclude cross-program recovery when the overpaid person is currently eligible for payment under the program from which we made the overpayment. The amended statute does not contain that restriction. As revised, § 416.572(b) also states that if we are already recovering an overpayment from title II benefits, the maximum amount which may be withheld from title XVI monthly benefits is the lesser of the person's title XVI benefit for that month or 10 percent of the person's total income for that month, not including the title II income used to compute the title XVI benefit.

Like the current regulations in 20 CFR part 408, subpart I, and part 416, subpart E, the final regulations for each program require that, before we impose cross-program recovery, we will notify the overpaid person of the proposed action and allow the overpaid person an opportunity to pay the remaining balance of the overpayment debt, to request review of the status of the debt, to request waiver of recovery, and to request recovery of the debt from current monthly benefits at a different rate than that stated in the notice. We will not begin cross-program recovery from current monthly benefits until 30 calendar days have elapsed after the date of the notice. If within that time period the person requests review of the debt, waiver of recovery of the debt, or reduction of the rate of recovery from current monthly benefits stated in the notice, we will not take any action to reduce current monthly benefits before we notify the debtor of our determination on the request. As permitted by section 1147(b)(2)(A) of the Act, the regulations provide that, if we find that the overpaid person or that person's spouse was involved in willful misrepresentation or concealment of material information in connection with the overpayment, we can withhold the entire amount of the current monthly benefit.

Following the discussion of our responses to public comments, we address changes that we made in §§ 404.530(b), 408.930(b) and 416.572(b) from the versions published in the notice of proposed rulemaking. See below under the heading *Additional Changes*.

Public Comments

On August 24, 2004, we published proposed rules in the **Federal Register** at 69 FR 51962 and provided a 30-day period for interested parties to comment. We received comments from six organizations. Because some of the comments received are quite detailed, we have condensed, summarized or paraphrased them in the discussion below. We address all of the significant issues raised by the commenters that are within the scope of the proposed rules.

Comment: Four organizations commented that the terms ''willful misrepresentation'' and ''concealment of material fact'' are not defined adequately in these regulations. They also commented that the actions of a recipient's spouse do not always reflect the intentions of the recipient and the recipient may not even be aware of his or her spouse's actions. Concerns were expressed that imposition of the 100 percent withholding could adversely affect innocent spouses and that the 100 percent withholding would be imposed improperly or without appropriate development to make a determination of willful misrepresentation or concealment of material information.

Response: The concepts of willful misrepresentation and concealment of material information for the purpose of cross-program recovery are not new. Since 2000, we have applied the same policy and procedures regarding willful misrepresentation and concealment of material information for cross-program recovery purposes as we apply when we collect SSI overpayments from monthly SSI benefits under section 1631(b) of the

Act and 20 CFR 416.571. The new regulations continue this practice under the expanded cross-program recovery authorized by section 210 of the SSPA. The new regulations include cross-references to the definition of the term ''concealment of material information'' in other regulations. Also, our operating instructions provide more detailed definitions and examples to guide SSA staff in determining whether willful misrepresentation or concealment of material information occurred.

In order to determine a person's continuing eligibility for SSI and the amount payable, we need to have accurate information about his or her spouse's income, living arrangements and resources. If the person is overpaid because the spouse willfully misrepresented or concealed material information, we think it is our stewardship duty to apply the 100 percent collection rule when appropriate. Our field offices have detailed instructions regarding the process for imposing 100 percent withholding due to willful misrepresentation or concealment of material information in connection with an overpayment. Whenever we propose to collect at the 100 percent rate, the person will be notified and have the opportunity to protest before we would take this action. We would take all factors into consideration before imposing 100 percent withholding. Moreover, an overpaid person whose spouse caused the overpayment may request that we waive collection, and we will grant waiver to a person who is without fault and satisfies the other waiver criteria.

Comment: Three organizations stated that we should include in the notices described in §§ 404.540, 408.932 and 416.574 the same information about the cause of the overpayment and the overpaid amount that we include in the initial notice of overpayment. They state that the information should be included because they feel a person cannot adequately identify or question an overpayment without more information. Two of the organizations also suggested that the notice advise the person that waiver can be requested at any time.

Response: After considering the comments, we decided not to adopt the suggested changes regarding information about the causes and original amount of the overpayment. The new notice described in §§ 404.540, 408.932 and 416.574 will show the balance of the overpayment at the time we send the notice. The initial notice of overpayment previously sent to the overpaid individual includes information such as the beginning balance of the overpayment, the cause of the overpayment, and the monthly amounts received compared to the monthly amounts that the person should have received for each month of the overpaid period. We include the more detailed information in initial notices of overpayment because those notices give overpaid individuals the right to request appeal of the fact or amount of the overpayment. To exercise that right, the overpaid individual needs to know specifically the overpayment amount, when the overpayment occurred, how the overpayment was calculated, and why the overpayment occurred.

The notices described in §§ 404.540, 408.932 and 416.574 are sent to the overpaid individual after the individual has had the opportunity to appeal the initial overpayment determination. At the time that this additional notice is sent, the individual has either appealed the initial overpayment determination and received our decision or has chosen not to appeal and the time to appeal the overpayment determination has expired. Accordingly, the detailed information about the overpayment is not required in the new notice regarding cross-program recovery in order to afford the individual due process of law on the decision to collect the overpayment balance by cross-program recovery. Under the new regulation, the overpaid individual would have the right to have us review whether he or she still owes all or part of the overpayment balance. For example, the individual may have evidence that he or she refunded all or part of the balance or that we previously waived collection. We believe that the new notice of cross-program recovery gives sufficient information about the overpayment for the individual to determine whether to ask for such review.

In addition, it is our long-held policy to provide the detailed information on the amount of the initial overpayment and the cause of the overpayment in the initial overpayment notice. We do not repeat that information with each subsequent overpayment-related notice that we send. In subsequent notices to overpaid individuals, we invite them to ask for more information if they want to know more detail. To make it easier for overpaid individuals to obtain additional information, we provide in our subsequent notices contact information, such as the Agency's national toll-free telephone number and the address and telephone number of the local office that is closest to them. We will include this contact information in the new notices described in §§ 404.540, 408.932, and 416.574. When overpaid persons ask for more information, we provide them with the details contained in our records, including why the overpayment occurred, when it occurred, and how we calculated the overpayment.

As to the suggestion that the notice advise that waiver can be requested at any time, the new notices described in §§ 404.540, 408.932 and 416.574 will advise that waiver may be requested at any time.

Comment: One organization raised a concern about cross-program recovery of overpayments from monthly title XVI benefits, claiming that ''[t]itle XVI beneficiaries are presumed to be unable to afford to repay overpayments under the law'' and ''[t]hey need only prove lack of fault in causing the overpayment to receive a waiver.'' The comment states that SSA should include this information in the notices that propose recovery from title XVI payments.

Response: This comment is based on an apparent misunderstanding of our existing regulations. A title XVI recipient does not have to show only that he or she is without fault to have overpayment recovery waived. In addition, the individual must demonstrate that recovery would defeat the purpose of title XVI, be against equity and good conscience, or impede efficient or effective administration of the program. Our regulation at 20 CFR 416.553(a) states that recovery defeats the purpose of the SSI program ''if the individual's income and resources are needed for ordinary and necessary living expenses.'' This explanation is included in our notice language about waiver. Section 416.553(b) explains the alternative criteria that meet the requirement described in § 416.553(a). Nowhere does the regulation say that a title XVI recipient is automatically deemed to meet the criteria for ''defeat the purpose'' of the SSI program.

Comment: Two organizations asserted that there are problems in the administration of our programs that cause overpayments; specifically, timely processing of reports of work activity and earned income which potentially affect eligibility or benefit amounts.

Response: Overpayments and underpayments of benefits occur for many reasons. We take our responsibility for stewardship of the programs that we administer very seriously, which is why we constantly track our payment accuracy and strive to minimize overpayments and to determine eligibility and process claims timely. In addition, we are pursuing several initiatives that address both the causes of overpayments and the timely processing of reports affecting

eligibility. Regardless of the reasons for overpayments, we are responsible for recovering as much of the overpaid money as possible consistent with the law.

Comment: One organization suggested that special language be added to the regulations to protect the health and welfare of individuals when they are receiving medical assistance in either a nursing facility, state institution or a home and community-based setting. They are concerned about the impact cross-program recovery ''will have on these individuals because it will reduce their countable income which Medicaid cannot supplement and then the provider will not receive full reimbursement.''

Response: The comment is not clear regarding the impact that cross-program recovery would have on the individuals described in the comment, and the organization does not specify the change(s) in the regulations that the organization wants. The Agency assumes that the organization wants special arrangements in the regulations that would apply while the overpaid person receives the medical assistance described in the comment. Such a change is not necessary because appropriate arrangements are already available in the rules governing waiver of recovery and recovering at a rate that is less than 10 percent of the current monthly benefits. Therefore, this suggestion is not being implemented since a special rule is not required to cover this situation. The general rules for overpayment recovery take into consideration a person's financial circumstances.

Additional Changes

Upon further review and consideration, we have deleted from §§ 404.530(b), 408.930(b) and 416.572(b), as published on August 24, 2004, the provisions that would exclude certain types of cases from cross-program recovery. Under one of the exclusions, we would not apply cross-program recovery when the overpaid person is no longer eligible for payment under the program where the overpayment occurred but is refunding that overpayment voluntarily by making monthly installment payments. Under the other exclusion, we would not recover an overpayment in one program by adjusting benefits payable under another program when we already are adjusting those benefits to recover an overpayment of benefits within that program.

As amended by section 210 of the SSPA, section 1147 of the Act permits us to apply cross-program recovery in both situations described above. By eliminating these exclusions from paragraph (b) of §§ 404.530, 408.930, and 416.572, we believe that we will fulfill our stewardship responsibilities regarding the programs more effectively. For example, if an individual is not eligible for SSI benefits and is refunding an SSI overpayment by making monthly installment payments, we would be able to recover the SSI overpayment balance by cross-program recovery against a title II past-due benefit. Cross-program recovery is a more efficient and reliable collection method than collection by installment payments. This approach is consistent with our policy under amended section 1147 of the Act to apply cross-program recovery in addition to adjusting benefits payable under the program in which the overpayment was made. Moreover, if an individual incurred both an SSI overpayment and a title II overpayment, we would be able to recover both the title II overpayment and the title XVI overpayment simultaneously from the title II benefits. For example, if we are collecting a title II overpayment by title II benefit adjustment and a large title II underpayment becomes payable, we could collect the title II overpayment balance from that underpayment and apply any remaining title II past-due benefits to the SSI overpayment.

Because these are material changes from the proposed rule, we have decided to offer an additional opportunity for public comment before we implement them.

In addition to the changes described above, we made a few non-substantive clarifying revisions in §§ 404.535(b), 408.931(b), and 416.573(b).

Regulatory Procedures

Pursuant to section 702(a)(5) of the Social Security Act, 42 U.S.C. 902(a)(5), SSA follows the Administrative Procedure Act rulemaking procedures specified in 5 U.S.C. 553 in the development of regulations. Subject to certain exceptions, 5 U.S.C. 553(d) requires that an agency publish a final rule at least 30 days before the rule becomes effective. Except for the changes in paragraph (b) of §§ 404.530, 408.930, and 416.572 discussed above, we find ''good cause'' under 5 U.S.C. 553(d)(3) for applying these regulations immediately. Waiting an additional 30 days would delay for no legitimate reason collection of overpayments made under titles II, VIII and XVI of the Act under the expanded authority for cross-program recovery. Such delay would be unnecessary and contrary to the public interest. There is a significant public interest in recovering those overpayments as soon as possible consistent with applicable law. We do not need 30 more days to prepare to begin implementing the expanded authority, and the regulations do not require any action by individuals or organizations to prepare for cross-program recovery.

Executive Order 12866

The Office of Management and Budget (OMB) has reviewed these rules in accordance with Executive Order 12866, as amended by Executive Order 13258. We have also determined that these rules meet the plain language requirement of Executive Order 12866, as amended by Executive Order 13258.

Regulatory Flexibility Act

We certify that these rules will not have a significant economic impact on a substantial number of small entities because it affects only individuals. Thus, a regulatory flexibility analysis as provided in the Regulatory Flexibility Act, as amended, is not required.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) says that no persons are required to respond to a collection of information unless it displays a valid OMB control number. In accordance with the PRA, SSA is providing notice that the Office of Management and Budget has approved the information collection requirements contained in § 408.932(c), (d) and (e) of these final rules. The OMB control number for this collection is 0960–0692, expiring 11/30/2007.

(Catalog of Federal Domestic Assistance Program Nos. 96.001, Social Security-Disability Insurance; 96.002, Social Security-Retirement Insurance; 96.004, Social Security-Survivors Insurance; 96.006, Supplemental Security Income; and 96.020, Special Benefits for Certain World War II Veterans)

List of Subjects

20 CFR Part 404

Administrative practice and procedure, Blind, Disability benefits, Old-Age, Survivors and Disability Insurance; Reporting and recordkeeping requirements, Social Security.

20 CFR Part 408

Administrative practice and procedure, Aged; Reporting and recordkeeping requirements, Social Security; Special Veterans benefits, Veterans.

20 CFR Part 416

Administrative practice and procedure, Aged, Blind, Disability benefits, Public assistance programs;

Reporting and recordkeeping requirements, Supplemental Security Income (SSI).

Dated: November 24, 2004.

Jo Anne B. Barnhart,

Commissioner of Social Security.

■ For the reasons set out in the preamble, we are amending subpart F of part 404, subpart I of part 408 and subpart E of part 416 of chapter III of title 20 of the Code of Federal Regulations as set forth below:

PART 404—FEDERAL OLD-AGE, SURVIVORS AND DISABILITY INSURANCE (1950–)

Subpart F—[Amended]

■ 1. The authority citation for subpart F of part 404 is revised to read as follows:

Authority: Secs. 204, 205(a), 702(a)(5), and 1147 of the Social Security Act (42 U.S.C. 404, 405(a), 902(a)(5), and 1320b–17); 31 U.S.C. 3720A.

■ 2. Sections 404.530, 404.535, 404.540 and 404.545 are added to read as follows:

§ 404.530 Are title VIII and title XVI benefits subject to adjustment to recover title II overpayments?

(a) *Definitions.* (1) *Cross-program recovery.* Cross-program recovery is the process that we will use to collect title II overpayments from benefits payable to you under title VIII and title XVI of the Act.

(2) *Benefits payable.* For purposes of this section, benefits payable means the amount of title VIII or title XVI benefits you actually would receive. For title VIII benefits, it includes your monthly benefit and any past-due benefits after any reduction by the amount of income for the month as described in §§ 408.505 through 408.515 of this chapter. For title XVI benefits, it includes your monthly benefit and any past-due benefits as described in § 416.420 of this chapter.

(b) *When may we collect title II overpayments using cross-program recovery?* We may use cross-program recovery to collect a title II overpayment you owe when benefits are payable to you under title VIII, title XVI, or both.

§ 404.535 How much will we withhold from your title VIII and title XVI benefits to recover a title II overpayment?

(a) If past-due benefits are payable to you, we will withhold the lesser of the entire overpayment balance or the entire amount of past-due benefits.

(b)(1) We will collect the overpayment from current monthly benefits due in a month under title VIII and title XVI by withholding the lesser of the amount of the entire overpayment balance or:

(i) 10 percent of the monthly title VIII benefits payable for that month and

(ii) in the case of title XVI benefits, an amount no greater than the lesser of the benefit payable for that month or an amount equal to 10 percent of your income for that month (including such monthly benefit but excluding payments under title II when recovery is also made from title II benefits and excluding income excluded pursuant to §§ 416.1112 and 416.1124 of this chapter).

(2) Paragraph (b)(1) of this section does not apply if:

(i) You request and we approve a different rate of withholding, or

(ii) You or your spouse willfully misrepresented or concealed material information in connection with the overpayment.

(c) In determining whether to grant your request that we withhold less than the amount described in paragraph (b)(1) of this section, we will use the criteria applied under § 404.508 to similar requests about withholding from title II benefits.

(d) If you or your spouse willfully misrepresented or concealed material information in connection with the overpayment, we will collect the overpayment by withholding the lesser of the overpayment balance or the entire amount of title VIII and title XVI benefits payable to you. We will not collect at a lesser rate. (See § 416.571 of this chapter for what we mean by concealment of material information.)

§ 404.540 Will you receive notice of our intention to apply cross-program recovery?

Before we collect an overpayment from you using cross-program recovery, we will send you a written notice that tells you the following information:

(a) We have determined that you owe a specific overpayment balance that can be collected by cross-program recovery;

(b) We will withhold a specific amount from the title VIII or title XVI benefits (see § 404.535);

(c) You may ask us to review this determination that you still owe this overpayment balance;

(d) You may request that we withhold a different amount from your current monthly benefits (the notice will not include this information if § 404.535(d) applies); and

(e) You may ask us to waive collection of this overpayment balance.

§ 404.545 When will we begin cross-program recovery from current monthly benefits?

(a) We will begin collecting the overpayment balance from your title VIII or title XVI current monthly benefits or payments by cross-program recovery no sooner than 30 calendar days after the date of the notice described in § 404.540. If within that 30-day period you pay us the full overpayment balance stated in the notice, we will not begin cross-program recovery.

(b) If within that 30-day period you ask us to review our determination that you still owe us this overpayment balance, we will not begin cross-program recovery from your current monthly benefits before we review the matter and notify you of our decision in writing.

(c) If within that 30-day period you ask us to withhold a different amount than the amount stated in the notice, we will not begin cross-program recovery from your current monthly benefits until we determine the amount we will withhold. This paragraph does not apply when § 404.535(d) applies.

(d) If within that 30-day period you ask us to waive recovery of the overpayment balance, we will not begin cross-program recovery from your current monthly benefits before we review the matter and notify you of our decision in writing. See §§ 404.506 through 404.512.

PART 408—SPECIAL BENEFITS FOR CERTAIN WORLD WAR II VETERANS

Subpart I—[Amended]

■ 3. The authority citation for subpart I of part 408 is revised to read as follows:

Authority: Secs. 702(a)(5), 808, and 1147 of the Social Security Act (42 U.S.C. 902(a)(5), 1008, and 1320b–17); 31 U.S.C. 3720A.

■ 4. Section 408.930 is revised to read as follows:

§ 408.930 Are title II and title XVI benefits subject to adjustment to recover title VIII overpayments?

(a) *Definitions.* (1) *Cross-program recovery.* Cross-program recovery is the process that we will use to collect title VIII overpayments from benefits payable to you under title II or title XVI of the Social Security Act.

(2) *Benefits payable.* For purposes of this section, benefits payable means the amount of title II or title XVI benefits you actually would receive. For title II benefits, it includes your monthly benefit and your past-due benefits after any reductions or deductions listed in § 404.401(a) and (b) of this chapter. For title XVI benefits, it includes your monthly benefit and your past-due benefits as described in § 416.420 of this chapter.

(b) *When may we collect title VIII overpayments using cross-program recovery?* We may use cross-program recovery to collect a title VIII

overpayment you owe when benefits are payable to you under title II, title XVI, or both.

■ 5. Section 408.931 is revised to read as follows:

§ 408.931 How much will we withhold from your title II and title XVI benefits to recover a title VIII overpayment?

(a) If past-due benefits are payable to you, we will withhold the lesser of the entire overpayment balance or the entire amount of past-due benefits.

(b)(1) We will collect the overpayment from current monthly benefits due in a month under title II and title XVI by withholding the lesser of the amount of the entire overpayment balance or:

(i) 10 percent of the monthly title II benefits payable for that month and

(ii) in the case of title XVI benefits, an amount no greater than the lesser of the benefit payable for that month or an amount equal to 10 percent of your income for that month (including such monthly benefit but excluding payments under title II when recovery is also made from title II benefits and excluding income excluded pursuant to §§ 416.1112 and 416.1124 of this chapter).

(2) Paragraph (b)(1) of this section does not apply if:

(i) You request and we approve a different rate of withholding, or

(ii) You or your spouse willfully misrepresented or concealed material information in connection with the overpayment.

(c) In determining whether to grant your request that we withhold less than the amount described in paragraph (b)(1) of this section, we will use the criteria applied under § 408.923 to similar requests about withholding from title VIII benefits.

(d) If you or your spouse willfully misrepresented or concealed material information in connection with the overpayment, we will collect the overpayment by withholding the lesser of the overpayment balance or the entire amount of title II benefits and title XVI benefits payable to you. We will not collect at a lesser rate. (See § 408.923 for what we mean by concealment of material information.)

■ 6. Section 408.932 is revised to read as follows:

§ 408.932 Will you receive notice of our intention to apply cross-program recovery?

Before we collect an overpayment from you using cross-program recovery, we will send you a written notice that tells you the following information:

(a) We have determined that you owe a specific overpayment balance that can be collected by cross-program recovery;

(b) We will withhold a specific amount from the title II or title XVI benefits (see § 408.931(b));

(c) You may ask us to review this determination that you still owe this overpayment balance;

(d) You may request that we withhold a different amount from your current monthly benefits (the notice will not include this information if § 408.931(d) applies); and

(e) You may ask us to waive collection of this overpayment balance.

■ 7. Section 408.933 is revised to read as follows:

§ 408.933 When will we begin cross-program recovery from your current monthly benefits?

(a) We will begin collecting the overpayment balance by cross-program recovery from your title II and title XVI current monthly benefits no sooner than 30 calendar days after the date of the notice described in § 408.932. If within that 30-day period you pay us the full overpayment balance stated in the notice, we will not begin cross-program recovery from your current monthly benefits.

(b) If within that 30-day period you ask us to review our determination that you still owe us this overpayment balance, we will not begin cross-program recovery from your current monthly benefits before we review the matter and notify you of our decision in writing.

(c) If within that 30-day period you ask us to withhold a different amount than the amount stated in the notice, we will not begin cross-program recovery from your current monthly benefits until we determine the amount we will withhold. This paragraph does not apply when § 408.931(d) applies.

(d) If within that 30-day period you ask us to waive recovery of the overpayment balance, we will not begin cross-program recovery from your current monthly benefits before we review the matter and notify you of our decision in writing. See §§ 408.910 through 408.914.

PART 416—SUPPLEMENTAL SECURITY INCOME FOR THE AGED, BLIND, AND DISABLED

Subpart E—[Amended]

■ 8. The authority citation for subpart E of part 416 continues to read as follows:

Authority: Secs. 702(a)(5), 1147, 1601, 1602, 1611(c) and (e), and 1631(a)–(d) and (g) of the Social Security Act (42 U.S.C. 902(a)(5), 1320b–17, 1381, 1381a, 1382(c) and (e), and 1383(a)–(d) and (g)); 31 U.S.C. 3720A.

■ 9. Section 416.570 is revised to read as follows:

§ 416.570 Adjustment—general rule.

When a recipient has been overpaid, the overpayment has not been refunded, and waiver of adjustment or recovery is not applicable, any payment due the overpaid recipient or his or her eligible spouse (or recovery from the estate of either or both when either or both die before adjustment is completed) is adjusted for recovery of the overpayment. Adjustment will generally be accomplished by withholding each month the amount set forth in § 416.571 from the benefit payable to the individual except that, when the overpayment results from the disposition of resources as provided by §§ 416.1240(b) and 416.1244, the overpayment will be recovered by withholding any payments due the overpaid recipient or his or her eligible spouse before any further payment is made. Absent a specific request from the person from whom recovery is sought, no overpayment made under title XVIII of the Act will be recovered by adjusting SSI benefits. In no case shall an overpayment of SSI benefits be adjusted against title XVIII benefits. No funds properly deposited into a dedicated account (see §§ 416.546 and 416.640(e)) can be used to repay an overpayment while the overpaid individual remains subject to the provisions of those sections.

■ 10. Section 416.572 is revised and sections 416.573, 416.574 and 416.575 are added to read as follows:

§ 416.572 Are title II and title VIII benefits subject to adjustment to recover title XVI overpayments?

(a) *Definitions.* (1) *Cross-program recovery.* Cross-program recovery is the process that we will use to collect title XVI overpayments from benefits payable to you under title II or title VIII of the Social Security Act.

(2) *Benefits payable.* For purposes of this section, benefits payable means the amount of title II or title VIII benefits you actually would receive. For title II benefits, it includes your monthly benefit and your past-due benefits after any reductions or deductions listed in § 404.401(a) and (b) of this chapter. For title VIII benefits, it includes your monthly benefit and any past-due benefits after any reduction by the amount of income for the month as described in §§ 408.505 through 408.510 of this chapter.

(b) *When may we collect title XVI overpayments using cross-program recovery?* We may use cross-program recovery to collect a title XVI

overpayment you owe when benefits are payable to you under title II, title VIII, or both.

§ 416.573 How much will we withhold from your title II and title VIII benefits to recover a title XVI overpayment?

(a) If past-due benefits are payable to you, we will withhold the lesser of the entire overpayment balance or the entire amount of past-due benefits.

(b)(1) We will collect the overpayment from current monthly benefits due in a month by withholding the lesser of the amount of the entire overpayment balance or 10 percent of the monthly title II benefits and monthly title VIII benefits payable to you in the month.

(2) If we are already recovering a title II, title VIII or title XVI overpayment from your monthly title II benefit, we will figure your monthly withholding from title XVI payments (as described in § 416.571) without including your title II benefits in your total countable income.

(3) Paragraph (b)(1) of this section does not apply if:

(i) You request and we approve a different rate of withholding, or

(ii) You or your spouse willfully misrepresented or concealed material information in connection with the overpayment.

(c) In determining whether to grant your request that we withhold less than the amount described in paragraph (b)(1) of this section, we will use the criteria applied under § 416.571 to similar requests about withholding from title XVI benefits.

(d) If you or your spouse willfully misrepresented or concealed material information in connection with the overpayment, we will collect the overpayment by withholding the lesser of the overpayment balance or the entire amount of title II benefits and title VIII benefits payable to you. We will not collect at a lesser rate. (See § 416.571 for what we mean by concealment of material information.)

§ 416.574 Will you receive notice of our intention to apply cross-program recovery?

Before we collect an overpayment from you using cross-program recovery, we will send you a written notice that tells you the following information:

(a) We have determined that you owe a specific overpayment balance that can be collected by cross-program recovery;

(b) We will withhold a specific amount from the title II or title VIII benefits (see § 416.573);

(c) You may ask us to review this determination that you still owe this overpayment balance;

(d) You may request that we withhold a different amount from your current monthly benefits (the notice will not include this information if § 416.573(d) applies); and

(e) You may ask us to waive collection of this overpayment balance.

§ 416.575 When will we begin cross-program recovery from your current monthly benefits?

(a) We will begin collecting the overpayment balance by cross-program recovery from your current monthly title II and title VIII benefits no sooner than 30 calendar days after the date of the notice described in § 416.574. If within that 30-day period you pay us the full overpayment balance stated in the notice, we will not begin cross-program recovery.

(b) If within that 30-day period you ask us to review our determination that you still owe us this overpayment balance, we will not begin cross-program recovery from your current monthly benefits before we review the matter and notify you of our decision in writing.

(c) If within that 30-day period you ask us to withhold a different amount from your current monthly benefits than the amount stated in the notice, we will not begin cross-program recovery until we determine the amount we will withhold. This paragraph does not apply when § 416.573(d) applies.

(d) If within that 30-day period you ask us to waive recovery of the overpayment balance, we will not begin cross-program recovery from your current monthly benefits before we review the matter and notify you of our decision in writing. See §§ 416.550 through 416.556.

[FR Doc. 04–28693 Filed 12–30–04; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 27

[USCG–2003–15486]

RIN 1625–AA73

Civil Monetary Penalties—Adjustments for Inflation; Correction

AGENCY: Coast Guard, DHS.

ACTION: Correcting amendments.

SUMMARY: This document contains corrections to the final regulations published in the **Federal Register** on December 23, 2003. The regulations related to inflation adjustments in fines and other civil monetary penalties that are mandated by the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended.

DATES: Effective on January 3, 2005.

FOR FURTHER INFORMATION CONTACT: Mr. Robert Spears, Office of Standards Evaluation and Development, Coast Guard, telephone 202–267–1099.

SUPPLEMENTARY INFORMATION:

Background

The Coast Guard published a final rule in the **Federal Register** of December 23, 2003 (68 FR 74189). The final rule was authorized by the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (''the statute''; *see* 28 U.S.C. 2641 note), and promulgated under a ''good cause'' exception to the Administrative Procedure Act, 5 U.S.C. 553(b)(3)(B), because the Coast Guard found good cause to dispense with the usual notice and comment requirements due to the lack of discretion rulemakers can exercise under the statute. One of the amendments made by the final rule revised 33 CFR 27.3 and its accompanying Table 1, ''Civil Monetary Penalty Inflation Adjustments.''

Need for Correction

As published, the final rule inadvertently contained some potentially misleading language and omitted certain fines or penalties that, pursuant to the statute, required inclusion.

List of Subjects in 33 CFR Part 27

Marine safety, Oil pollution, Penalties, Vessels, Waterways.

■ Accordingly, 33 CFR part 27 is corrected by making the following correcting amendments:

PART 27—CIVIL MONETARY PENALTIES ADMINISTERED BY THE COAST GUARD

■ 1. The authority citation for part 27 continues to read as follows:

Authority: Secs. 1–6, Pub. L. 101–410, 104 Stat. 890, as amended by Sec. 31001(s)(1), Pub. L. 104–134, 110 Stat. 1321 (28 U.S.C. 2461 note); Department of Homeland Security Delegation No. 0170.1, sec. 2 (106).

§ 27.1 [Removed]

■ 2. Remove § 27.1.

■ 3. Revise § 27.3 to read as follows:

§ 27.3 Penalty Table.

Table 1 lists sections of the United States Code that authorize civil monetary penalties for laws administered by the Coast Guard. These penalties are assessable in either civil judicial or administrative proceedings. Table 1 is periodically amended to

reflect relevant changes in the United States Code and to show adjustments in penalty amounts that are mandated by the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended, but Table 1 will not reflect statutory changes that may take effect subsequent to the most recent amendment of Table 1. In any case of conflict between Table 1 and the current provisions of the United States Code or another Federal statute, the current Code or statutory provision is controlling.

TABLE 1.—CIVIL MONETARY PENALTIES

U.S. Code citation	Civil monetary penalty description	Statutory penalty ($)	Inflation adjustments per 1990 Act as amended ($)
14 U.S.C. 88(c)	Saving Life and Property	5,000	6,500
14 U.S.C. 645(i)	Confidentiality of Medical Quality Assurance Records (first offense).	3,000	3,300
14 U.S.C. 645(i)	Confidentiality of Medical Quality Assurance Records (subsequent offenses).	20,000	27,000
16 U.S.C. 4711(g)(1)	Aquatic Nuisance Species in Waters of the United States	25,000	27,500
19 U.S.C. 70	Obstruction of Revenue Officers by Masters of Vessels	2,000	2,200
19 U.S.C. 70	Obstruction of Revenue Officers by Masters of Vessels—Minimum Penalty.	500	550
19 U.S.C. 1581(d)	Failure to Stop Vessel When Directed; Master, Owner, Operator or Person in Charge.	5,000	(**)
19 U.S.C. 1581(d)	Failure to Stop Vessel When Directed; Master, Owner, Operator or Person in Charge—Minimum Penalty.	1,000	(**)
33 U.S.C. 471	Anchorage Ground/Harbor Regulations General	100	110
33 U.S.C. 474	Anchorage Ground/Harbor Regulations St. Mary's river	200	220
33 U.S.C. 495(b)	Bridges/Failure to Comply with Regulations	*5,000	(***)
33 U.S.C. 499(c)	Bridges/Drawbridges	*5,000	(***)
33 U.S.C. 502(c)	Bridges/Failure to Alter Bridge Obstructing Navigation	*5,000	(***)
33 U.S.C. 533(b)	Bridges/Maintenance and Operation	*5,000	(***)
33 U.S.C. 1208(a)	Bridge to Bridge Communication; Master, Person in Charge or Pilot.	500	650
33 U.S.C. 1208(b)	Bridge to Bridge Communication; Vessel	500	650
33 U.S.C. 1232(a)	PWSA Regulations	25,000	32,500
33 U.S.C. 1236(b)	Vessel Navigation: Regattas or Marine Parades; Unlicensed Person in Charge.	5,000	6,500
33 U.S.C. 1236(c)	Vessel Navigation: Regattas or Marine Parades; Owner Onboard Vessel.	5,000	6,500
33 U.S.C. 1236(d)	Vessel Navigation: Regattas or Marine Parades; Other Persons.	2,500	2,750
33 U.S.C. 1321(b)(6)(B)(i)	Oil/Hazardous Substances: Discharges (Class I per violation)	10,000	11,000
33 U.S.C. 1321(b)(6)(B)(i)	Oil/Hazardous Substances: Discharges (Class I total under paragraph).	25,000	32,500
33 U.S.C. 1321(b)(6)(B)(ii)	Oil/Hazardous Substances: Discharges (Class II per day of violation).	10,000	11,000
33 U.S.C. 1321(b)(6)(B)(ii)	Oil/Hazardous Substances: Discharges (Class II total under paragraph).	125,000	157,500
33 U.S.C. 1321(b)(7)(A)	Oil/Hazardous Substances: Discharges (per day of violation) Judicial Assessment.	25,000	32,500
33 U.S.C. 1321(b)(7)(A)	Oil/Hazardous Substances: Discharges (per barrel of oil or unit discharged) Judicial Assessment.	1,000	1,100
33 U.S.C. 1321(b)(7)(B)	Oil/Hazardous Substances: Failure to Carry Out Removal/Comply With Order (Judicial Assessment).	25,000	32,500
33 U.S.C. 1321(b)(7)(C)	Oil/Hazardous Substances: Failure to Comply with Regulation Issued Under 1321(j) (Judicial Assessment).	25,000	32,500
33 U.S.C. 1321(b)(7)(D)	Oil/Hazardous Substances: Discharges, Gross Negligence (per barrel of oil or unit discharged) Judicial Assessment.	3,000	3,300
33 U.S.C. 1321(b)(7)(D)	Oil/Hazardous Substances: Discharges, Gross Negligence-Minimum Penalty (Judicial Assessment).	100,000	110,000
33 U.S.C. 1322(j)	Marine Sanitation Devices; Operating	2,000	2,200
33 U.S.C. 1322(j)	Marine Sanitation Devices; Sale or Manufacture	5,000	6,500
33 U.S.C. 1517(a)	Deepwater Ports; Oil Discharge	10,000	11,000
33 U.S.C. 1608(a)	International Navigation Rules; Operator	5,000	6,500
33 U.S.C. 1608(b)	International Navigation Rules; Vessel	5,000	6,500
33 U.S.C. 1908(b)(1)	Pollution from Ships; General	25,000	32,500
33 U.S.C. 1908(b)(2)	Pollution from Ships; False Statement	5,000	6,500
33 U.S.C. 2072(a)	Inland Navigation Rules; Operator	5,000	6,500
33 U.S.C. 2072(b)	Inland Navigation Rules; Vessel	5,000	6,500
33 U.S.C. 2609(a)	Shore Protection; General	25,000	32,500
33 U.S.C. 2609(b)	Shore Protection; Operating Without Permit	10,000	11,000
33 U.S.C. 2716a(a)	Oil Pollution Liability and Compensation	25,000	32,500
42 U.S.C. 9609(a)	Hazardous Substances, Releases, Liability, Compensation (Class I).	25,000	27,500

TABLE 1.—CIVIL MONETARY PENALTIES—Continued

U.S. Code citation	Civil monetary penalty description	Statutory penalty ($)	Inflation adjustments per 1990 Act as amended ($)
42 U.S.C. 9609(b)	Hazardous Substances, Releases, Liability, Compensation (Class II).	25,000	27,500
42 U.S.C. 9609(b)	Hazardous Substances, Releases, Liability, Compensation (Class II subsequent offense).	75,000	82,500
42 U.S.C. 9609(c)	Hazardous Substances, Releases, Liability, Compensation (Judicial Assessment).	25,000	27,500
42 U.S.C. 9609(d)	Hazardous Substances, Releases, Liability, Compensation (Judicial Assessment subsequent offense).	75,000	82,500
46 U.S.C. App 1505(a)(2)	Safe Containers for International Cargo	5,000	6,500
46 U.S.C. App 1805(c)(2)	Suspension of Passenger Service	50,000	60,000
46 U.S.C. 2110(e)	Vessel Inspection or Examination Fees	5,000	6,500
46 U.S.C. 2115	Alcohol and Dangerous Drug Testing	5,000	5,500
46 U.S.C. 2302(a)	Negligent Operations: Recreational Vessels	5,000	(***)
46 U.S.C. 2302(a)	Negligent Operations: Other Vessels	25,000	(***)
46 U.S.C. 2302(c)(1)	Operating a Vessel While Under the Influence of Alcohol or a Dangerous Drug.	5,000	5,500
46 U.S.C. 2306(a)(4)	Vessel Reporting Requirements: Owner, Charterer, Managing Operator, or Agent.	5,000	6,500
46 U.S.C. 2306(b)(2)	Vessel Reporting Requirements: Master	1,000	1,100
46 U.S.C. 3102(c)(1)	Immersion Suits	5,000	6,500
46 U.S.C. 3302(i)(5)	Inspection Permit	1,000	1,100
46 U.S.C. 3318(a)	Vessel Inspection; General	5,000	6,500
46 U.S.C. 3318(g)	Vessel Inspection; Nautical School Vessel	5,000	6,500
46 U.S.C. 3318(h)	Vessel Inspection; Failure to Give Notice IAW 3304(b)	1,000	1,100
46 U.S.C. 3318(i)	Vessel Inspection; Failure to Give Notice IAW 3309(c)	1,000	1,100
46 U.S.C. 3318(j)(1)	Vessel Inspection; Vessel ≥ 1600 Gross Tons	10,000	11,000
46 U.S.C. 3318(j)(1)	Vessel Inspection; Vessel < 1600 Gross Tons	2,000	2,200
46 U.S.C. 3318(k)	Vessel Inspection; Failure to Comply with 3311(b)	10,000	11,000
46 U.S.C. 3318(l)	Vessel Inspection; Violation of 3318(b)–3318(f)	5,000	6,500
46 U.S.C. 3502(e)	List/count of Passengers	100	110
46 U.S.C. 3504(c)	Notification to Passengers	10,000	11,000
46 U.S.C. 3504(c)	Notification to Passengers; Sale of Tickets	500	650
46 U.S.C. 3506	Copies of Laws on Passenger Vessels; Master	200	220
46 U.S.C. 3718(a)(1)	Liquid Bulk/Dangerous Cargo	25,000	32,500
46 U.S.C. 4106	Uninspected Vessels	5,000	6,500
46 U.S.C. 4311(b)(1)	Recreational Vessels (maximum for related series of violations).	250,000	(***)
46 U.S.C. 4311(b)(1)	Recreational Vessels; Violation of 4307(a)	5,000	(***)
46 U.S.C. 4311(c)	Recreational vessels	1,000	1,100
46 U.S.C. 4507(a)	Uninspected Commercial Fishing Industry Vessels	5,000	6,500
46 U.S.C. 4703	Abandonment of Barges	1,000	1,100
46 U.S.C. 5116(a)	Load Lines	5,000	6,500
46 U.S.C. 5116(b)	Load Lines; Violation of 5112(a)	10,000	11,000
46 U.S.C. 5116(c)	Load Lines; Violation of 5112(b)	5,000	6,500
46 U.S.C. 6103(a)	Reporting Marine Casualties	25,000	27,500
46 U.S.C. 6103(b)	Reporting Marine Casualties; Violation of 6104	5,000	6,500
46 U.S.C. 8101(e)	Manning of Inspected Vessels; Failure to Report Deficiency in Vessel Complement.	1,000	1,100
46 U.S.C. 8101(f)	Manning of Inspected Vessels	10,000	11,000
46 U.S.C. 8101(g)	Manning of Inspected Vessels; Employing or Serving in Capacity not Licensed by USCG.	10,000	11,000
46 U.S.C. 8101(h)	Manning of Inspected Vessels; Freight Vessel < 100 GT, Small Passenger Vessel, or Sailing School Vessel.	1,000	1,100
46 U.S.C. 8102(a)	Watchmen on Passenger Vessels	1,000	1,100
46 U.S.C. 8103(f)	Citizenship Requirements	500	650
46 U.S.C. 8104(i)	Watches on Vessels; Violation of 8104(a) or (b)	10,000	11,000
46 U.S.C. 8104(j)	Watches on Vessels; Violation of 8104(c), (d), (e), or (h)	10,000	11,000
46 U.S.C. 8302(e)	Staff Department on Vessels	100	110
46 U.S.C. 8304(d)	Officer's Competency Certificates	100	110
46 U.S.C. 8502(e)	Coastwise Pilotage; Owner, Charterer, Managing Operator, Agent, Master or Individual in Charge.	10,000	11,000
46 U.S.C. 8502(f)	Coastwise Pilotage; Individual	10,000	11,000
46 U.S.C. 8503	Federal Pilots	25,000	32,500
46 U.S.C. 8701(d)	Merchant Mariners Documents	500	650
46 U.S.C. 8702(e)	Crew Requirements	10,000	11,000
46 U.S.C. 8906	Small Vessel Manning	25,000	27,500
46 U.S.C. 9308(a)	Pilotage: Great Lakes; Owner, Charterer, Managing Operator, Agent, Master or Individual in Charge.	10,000	11,000

TABLE 1.—CIVIL MONETARY PENALTIES—Continued

U.S. Code citation	Civil monetary penalty description	Statutory penalty ($)	Inflation adjustments per 1990 Act as amended ($)
46 U.S.C. 9308(b)	Pilotage: Great Lakes; Individual	10,000	11,000
46 U.S.C. 9308(c)	Pilotage: Great Lakes; Violation of 9303	10,000	11,000
46 U.S.C. 10104(b)	Failure to Report Sexual Offense	5,000	6,500
46 U.S.C. 10314(a)(2)	Pay Advances to Seamen	500	650
46 U.S.C. 10314(b)	Pay Advances to Seamen; Remuneration for Employment	500	650
46 U.S.C. 10315(c)	Allotment to Seamen	500	650
46 U.S.C. 10321	Seamen Protection; General	5,000	5,500
46 U.S.C. 10505(a)(2)	Coastwise Voyages: Advances	5,000	5,500
46 U.S.C. 10505(b)	Coastwise Voyages: Advances; Remuneration for Employment.	5,000	5,500
46 U.S.C. 10508(b)	Coastwise Voyages: Seamen Protection; General	5,000	5,500
46 U.S.C. 10711	Effects of Deceased Seamen	200	220
46 U.S.C. 10902(a)(2)	Complaints of Unfitness	500	650
46 U.S.C. 10903(d)	Proceedings on Examination of Vessel	100	110
46 U.S.C. 10907(b)	Permission to Make Complaint	500	650
46 U.S.C. 11101(f)	Accommodations for Seamen	500	650
46 U.S.C. 11102(b)	Medicine Chests on Vessels	500	650
46 U.S.C. 11104(b)	Destitute Seamen	100	110
46 U.S.C. 11105(c)	Wages on Discharge	500	650
46 U.S.C. 11303(a)	Log Books; Master Failing to Maintain	200	220
46 U.S.C. 11303(b)	Log Books; Master Failing to Make Entry	200	220
46 U.S.C. 11303(c)	Log Books; Late Entry	150	165
46 U.S.C. 11506	Carrying of Sheath Knives	50	65
46 U.S.C. 12122(a)	Vessel Documentation	10,000	11,000
46 U.S.C. 12122(c)	Vessel Documentation; Fishery Endorsement	100,000	110,000
46 U.S.C. 12309(b)	Numbering of Undocumented Vessels	1,000	1,100
46 U.S.C. 12507(b)	Vessel Identification System	10,000	11,000
46 U.S.C. 14701	Measurement of Vessels	20,000	27,000
46 U.S.C. 14702	Measurement; False Statements	20,000	27,000
46 U.S.C. 31309	Commercial Instruments and Maritime Liens	10,000	11,000
46 U.S.C. 31330(a)(2)	Commercial Instruments and Maritime Liens; Mortgagor	10,000	11,000
46 U.S.C. 31330(b)(2)	Commercial Instruments and Maritime Liens; Violation of 31329.	25,000	27,500
46 U.S.C. 70119	Port Security	25,000	(***)
49 U.S.C. 5123(a)(1)	Hazardous Materials: Related to Vessels	25,000	32,500
49 U.S.C. 5123(a)(1)	Hazardous Materials: Related to Vessels—Minimum Penalty	250	275

* These penalties will increase in accordance with the statute to: $10,000 in 2005, $15,000 in 2006, $20,000 in 2007, and $25,000 in 2008 and thereafter.
** Enacted under the Tariff Act of 1930, exempt from inflation adjustments.
*** These penalties did not qualify for an adjustment under the rounding rules of the Act.

Dated: December 23, 2004.

T.H. Gilmour,

Rear Admiral, U.S. Coast Guard, Assistant Commandant for Marine Safety, Security and Environmental Protection.

[FR Doc. 04–28676 Filed 12–30–04; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[CGD13–04–044]

RIN 1625–AA00

Safety Zones: Fireworks Displays in the Captain of the Port Portland Zone

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone on the waters of the Columbia River during a New Year's fireworks display. The Captain of the Port, Portland, Oregon, is taking this action to safeguard watercraft and their occupants from safety hazards associated with this display. Entry into this safety zone is prohibited unless authorized by the Captain of the Port.

DATES: This rule is effective from 11:30 p.m. (p.s.t.) on December 31, 2004, to 12:30 a.m. (p.s.t.) on January 1, 2005.

ADDRESSES: Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, are available for inspection or copying at U.S. Coast Guard MSO/Group Portland, 6767 N. Basin Ave, Portland, Oregon 97217 between 7 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Lieutenant (Junior Grade) Belen Audirsch, c/o Captain of the Port, Portland 6767 N. Basin Avenue, Portland, Oregon 97217, (503) 240–9301.

SUPPLEMENTARY INFORMATION:

Regulatory Information

We did not publish a notice of proposed rulemaking (NPRM) for this regulation. Under 5 U.S.C. 553(b)(B) and 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for not publishing an NPRM and for making this rule effective less than 30 days after publication in the **Federal Register**. Publishing a NPRM would be contrary to public interest since immediate action is necessary to ensure the safety of vessels and spectators gathering in

the vicinity of the fireworks fallout areas. If normal notice and comment procedures were followed, this rule would not become effective until after the date of the event. For this reason, following normal rulemaking procedures in this case would be impracticable and contrary to the public interest.

Background and Purpose

The Coast Guard is establishing a temporary safety zone to allow for a safe fireworks display. This event occurs on the Columbia River in Cascade Locks, OR, and is scheduled to start at midnight and last approximately 15 minutes. This event may result in a number of vessels congregating near the fireworks launching and fallout sites. The safety zone is needed to protect watercraft and their occupants from safety hazards associated with fireworks displays. Captain of the Port, Portland, Oregon, will enforce this temporary safety zone. The Captain of the Port may be assisted by other federal and local agencies.

Discussion of Rule

This rule, for safety concerns, will control vessels, personnel and individual movements in a regulated area surrounding the fireworks event indicated in section 2 of this Temporary Final Rule. Entry into this zone is prohibited unless authorized by the Captain of the Port, Portland or his designated representative. Captain of the Port, Portland, Oregon, will enforce this safety zone. The Captain of the Port may be assisted by other federal and local agencies.

Regulatory Evaluation

This rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed this rule under that Order. This rule is not ''significant'' under the regulatory policies and procedures of the Department of Homeland Security (DHS). The Coast Guard expects the economic impact of this rule to be so minimal that a full Regulatory Evaluation under the regulatory policies and procedures act of DHS is unnecessary. This expectation is based on the fact that the regulated area established by the regulation will encompass a small portion of the Columbia River in the Captain of the Port, Portland, Oregon AOR in the evening when vessel traffic is low.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), we considered whether this rule would have a significant economic impact on a substantial number of small entities. The term ''small entities'' include small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. This rule will affect the following entities, some of which may be small entities: the owners or operators of vessels intending to transit a portion of the Columbia River during the times and dates mentioned under 2(c) of this Temporary Final Rule. This safety zone will not have significant economic impact on a substantial number of small entities for the following reasons. This rule will be in effect no more than one hour during one evening when vessel traffic is low. Traffic will be allowed to pass through the zone with the permission of the Captain of the Port or his designated representatives on scene, if safe to do so. Because the impacts of this rule are expected to be so minimal, the Coast Guard certifies under 5 U.S.C. 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) that this temporary final rule will not have a significant economic impact on a substantial number of small entities.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding the rule so that they can better evaluate its effects on them and participate in the rulemaking process. If the rule will affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

Collection of Information

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

Federalism

We have analyzed this rule under Executive Order 13132 and have determined that this temporary final rule does not have implications for federalism under that Order.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) governs the issuance of Federal regulations that require unfunded mandates. An unfunded mandate is a regulation that requires a State, local, or tribal government or the private sector to incur direct costs without the Federal Government's having first provided the funds to pay those unfunded mandate costs. This rule will not impose an unfunded mandate.

Taking of Private Property

This rule will not effect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not concern an environmental risk to health or risk to safety that may disproportionately affect children.

Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian tribal governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.

Energy Effects

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a ''significant energy action'' under that order because it is not a ''significant regulatory action'' under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. It has not been designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

Environment

We have analyzed this rule under Commandant Instruction M16475.1D, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, this rule is categorically excluded, under figure 2–1, paragraph (34)(g) of the Instruction, from further environmental documentation.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

■ For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for Part 165 continues to read as follows:

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701; 50 U.S.C. 191, 195; 33 CFR 1.05–1(g), 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. A temporary § 165.T13–019 is added to read as follows:

§ 165.T13–019 Temporary Safety Zone; Port of Cascade Locks Fireworks Display, Columbia River, Cascade Locks, Oregon.

(a) *Location.* The following area is a safety zone: the navigable waters of the Columbia River in the vicinity of Port Marine Park in Cascade Locks, Oregon, bounded by a 400′ radius from the fallout area centered on land at point 45°39′56″ N, 121°53′ 47″ W.

(b) *Regulations.* In accordance with the general regulations in Section 165.23 of this part, no person or vessel may enter or remain in this zone unless authorized by the Captain of the Port or his designated representatives.

(c) *Effective dates.* This regulation is effective from 11:30 p.m. (PST) on December 31, 2004, to 12:30 a.m. (PST) on January 1, 2005.

Dated: December 17, 2004.

Paul D. Jewell,

Captain, U.S. Coast Guard, Captain of the Port.

[FR Doc. 04–28552 Filed 12–30–04; 8:45 am]

BILLING CODE 4910–75–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[R06–OAR–2004–TX–0003; FRL–7856–7]

Approval and Promulgation of Implementation Plans; Texas; Victoria County Maintenance Plan Update

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action approving a State Implementation Plan (SIP) revision submitted by the Texas Commission on Environmental Quality (TCEQ) on February 18, 2003, concerning the Victoria County 1-hour ozone maintenance area. This SIP revision satisfies the Clean Air Act requirement as amended in 1990 for the second 10-year update to the Victoria County 1-hour ozone maintenance area.

DATES: This rule is effective on March 4, 2005 without further notice, unless EPA receives adverse comment by February 2, 2005. If EPA receives such comment, EPA will publish a timely withdrawal in the **Federal Register** informing the public that this rule will not take effect.

ADDRESSES: Submit your comments, identified by Regional Materials in EDocket (RME) ID No. R06–OAR–2004–TX–0003, by one of the following methods:

• Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.

• Agency Web site: *http://docket.epa.gov/rempub/.* Regional Materials in EDocket (RME), EPA's electronic public docket and comment system, is EPA's preferred method for receiving comments. Once in the system, select ''quick search,'' then key in the appropriate RME Docket identification number. Follow the online instructions for submitting comments.

• EPA Region 6 ''Contact Us'' Web site: *http://epa.gov/region6/r6coment.htm.* Please click on ''6PD'' (Multimedia) and select ''Air'' before submitting comments.

• E-mail: Mr. Thomas Diggs at *diggs.thomas@epa.gov.* Please also send a copy by e-mail to the person listed in the **FOR FURTHER INFORMATION CONTACT** section below.

• Fax: Mr. Thomas Diggs, Chief, Air Planning Section (6PD–L), at fax number 214–665–7263.

• Mail: Mr. Thomas Diggs, Chief, Air Planning Section (6PD–L), Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202–2733.

• Hand or Courier Delivery: Mr. Thomas Diggs, Chief, Air Planning Section (6PD–L), Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202–2733. Such deliveries are accepted only between the hours of 8 a.m. and 4 p.m. weekdays except for legal holidays. Special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to RME ID No. R06–OAR–2004–TX–0003. EPA's policy is that all comments received will be included in the public file without change and may be made available online at *http://docket.epa.gov/rmepub/,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information the disclosure of which is restricted by statute. Do not submit information through Regional Materials in EDocket (RME), regulations.gov or e-mail if you believe that it is CBI or otherwise protected from disclosure. The EPA RME Web site and the Federal regulations.gov Web site are ''anonymous access'' systems, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through RME or regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public file and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to

technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters and any form of encryption, and should be free of any defects or viruses.

Docket: All documents in the electronic docket are listed in the Regional Materials in EDocket (RME) index at *http://docket.epa.gov/rempub/*. Although listed in the index, some information is not publicly available, *i.e.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in RME or in the official file, which is available at the Air Planning Section (6PD–L), Environmental Protection Agency, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733. The file will be made available by appointment for public inspection in the Region 6 FOIA Review Room between the hours of 8:30 a.m. and 4:30 p.m. weekdays except for legal holidays. Contact the person listed in the **FOR FURTHER INFORMATION CONTACT** paragraph below or Mr. Bill Deese at 214–665–7253 to make an appointment. If possible, please make the appointment at least two working days in advance of your visit. There will be a 15 cent per page fee for making photocopies of documents. On the day of the visit, please check in at the EPA Region 6 reception area at 1445 Ross Avenue, Suite 700, Dallas, Texas.

The State submittal is also available for public inspection at the State Air Agency listed below during official business hours by appointment:

Texas Commission on Environmental Quality, Office of Air Quality, 12124 Park 35 Circle, Austin, Texas 78753.

FOR FURTHER INFORMATION CONTACT: Peggy Wade, Air Planning Section (6PD–L), Environmental Protection Agency, Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733, telephone (214) 665–7247; fax number 214–665–7263; e-mail address *wade.peggy@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, whenever ''we'' ''us'' or ''our'' is used, we mean the EPA.

Outline

I. Background

On March 3, 1978, under the 1977 Clean Air Act (CAA) amendments, Victoria County, Texas, was designated a nonattainment area because it did not meet the National Ambient Air Quality Standards (NAAQS) for ozone (43 FR 8962). As required by the CAA, the state of Texas submitted a State Implementation Plan (SIP) to the EPA in 1979. This SIP outlined control measures to bring the area into attainment for the ozone NAAQS. This SIP was approved by EPA in two actions, one in 1980 and another in 1984. An additional SIP revision for Victoria County was submitted to EPA on November 12, 1992. This submission revised the air monitoring, reporting and recordkeeping requirements and was approved by EPA on March 7, 1995 (60 FR 12348).

On July 27, 1994, Texas submitted a request to redesignate Victoria County to attainment. At the same time, Texas submitted the required ozone monitoring data and a maintenance plan to ensure the area would remain in attainment for ozone for a period of 10 years. The maintenance plan submitted by Texas followed EPA guidance for limited maintenance areas, which provides relief for ozone areas that have design values less than 85% of the applicable standard. In this case, the applicable standard is the 1-hour ozone standard of 0.12 parts per million (ppm). At the time of the redesignation request, the design value for Victoria County was 0.100 ppm, well below the 85% threshold of 0.106 ppm. EPA approved Texas's request, and Victoria County was redesignated to attainment on March 7, 1995, with an effective date of May 8, 1995 (60 FR 12453).

Section 175A(b) of the CAA as amended in 1990 requires the state to submit a subsequent maintenance plan to EPA eight years after designation to attainment. This SIP revision satisfies this CAA requirement for the Victoria County 1-hour ozone maintenance area.

II. Analysis of the State's Submittal

On February 18, 2003, the Texas Commission on Environmental Quality (TCEQ) submitted a revision to the SIP for Victoria County. This revision provides the second 10-year update to the maintenance plan for the area, as required by the section 175A(b) of the CAA. The purpose of this plan is to ensure continued maintenance of the NAAQS for 1-hour ozone in Victoria County by demonstrating that future emissions of the ozone precursor pollutants, nitrogen oxides (NO_X) and volatile organic compounds (VOCs) are expected to remain at or below attainment year emission levels.

This revision is a continuation of an existing maintenance plan and no new control strategies specifically for Victoria County have been incorporated. However, since approval of the existing plan, which occurred in March of 1995, TCEQ has implemented several regional air quality measures which will provide improved control of air pollution in Victoria County. These measures include the following elements, among others: (1) Implementation of Stage I vapor recovery which serves to reduce VOC emissions from gas stations as the gasoline storage tanks are refilled, (2) enacting specific requirements for the permitting or shutdown of previously grandfathered facilities such as pipelines, small stationary sources and electric generating facilities, (3) required reductions in NO_X emission rates from larger point sources such as electric utility boilers and gas turbines and (4) implementation of control requirements for non-road, large spark-ignition engines, beginning with model year 2004, that match California standards. The purpose of these regional measures is to reduce background levels of ozone in order to facilitate compliance with the ozone standard in nonattainment, maintenance and near-nonattainment areas, including Victoria County.

This SIP revision also updates the monitoring data for Victoria County. Air quality monitoring is the method by which continued attainment of the NAAQS is demonstrated. TCEQ commits to keep the current Victoria area air monitors active for the duration of the second 10-year maintenance period. The current system consists of two monitors; one (CAMS 87) is in the City of Victoria and the other (CAMS 602, a private monitor meeting 40 CFR part 58 Quality Assurance requirements), which has been operational since July 19, 2000, is located southeast of the City of Victoria. The current 1-hour ozone design value for Victoria County, based on 2001–2003 data from the CAMS 87 monitor, is 0.094 ppm, which remains less than 85% of the 1-hour ozone NAAQS of 0.12 ppm. The design value from the private CAMS 602 monitor, based on 2001–2003 data, is 0.090 ppm. Also, Victoria was designated attainment for the new, more protective 8-hour ozone standard on April 15, 2004 (69 FR 23858, published on April 30, 2004). The 8-hour ozone NAAQS is 0.08 ppm (62 FR38856). The 8-hour ozone design value is 0.078 ppm at the CAMS 87 monitor, based on 2001–2003 data. The CAMS 602 monitor has a design value of 0.073 ppm for 2001–2003 data.

Section 175A of the CAA requires that a maintenance plan include contingency provisions to promptly correct any violation of the NAAQS that occurs after redesignation of the area to attainment. With this submission, TCEQ is revising the contingency measures and contingency trigger levels in the existing SIP for Victoria County. The contingency indicator will remain the ambient air quality monitoring data, taken from the most recent three years of monitoring data. The triggering mechanism has been adjusted from that contained in the existing SIP. Three basic trigger levels are specified for the activation of contingency measures. They are as follows:

(a) A monitor shows one exceedance of the NAAQS during a three-year period;

(b) A monitor shows two or three exceedances of the NAAQS during a three-year period; or

(c) A monitor shows the fourth exceedance, and therefore a violation, of the NAAQS during a three-year period.

These trigger levels are appropriate in that they require action to be taken with a single exceedance of the NAAQS. This will assist the area in implementing measures that may lessen future exceedances and potentially avoid a violation of the NAAQS.

The activation of contingency measures in the submitted maintenance plan revision are associated with specific triggers. In the existing plan, implementation of Stage I vapor recovery systems is an approved contingency measure. However, this measure has been implemented regionally by TCEQ and is thus already in effect in Victoria County and is no longer appropriate as a contingency measure in the maintenance plan. This SIP revision removes Stage I vapor recovery as a contingency measure for Victoria County. The contingency measures adopted by TCEQ for Victoria County include the following:

(a) Upon one exceedance of the NAAQS at either air quality monitor within a three-year period, the City of Victoria and the Metropolitan Planning Organization will establish a formal ozone advisory committee with the intended purpose of managing an ozone abatement program during the ozone season;

(b) Upon two exceedances of the NAAQS within a three-year period, the ozone advisory committee will implement a voluntary program with industry to reschedule, revise or curtail activities on ozone advisory days, and;

(c) Upon a violation of the NAAQS (*i.e.*, four exceedances during a three-year period), TCEQ will submit to EPA a full maintenance plan in accordance with the CAA and EPA guidance.

This SIP submission also serves to update the emissions inventory for Victoria County. In the existing SIP, the base year or attainment year inventory is for 1992. Texas has updated the inventory to be consistent with reported and estimated emissions for 1996. The choice of 1996 as a new base year is acceptable because the area was in attainment in 1996, with a design value of 0.98 ppm. The 1996 emission inventory for area, point, nonroad mobile, onroad mobile and biogenic sources is provided in the following table.

	VOC (tons per day)	NO_X (tons per day)
Point	2.91	20.18
Area	9.09	2.81
Nonroad Mobile	4.74	6.56
Onroad Mobile	5.89	8.72
Biogenic	161.11	3.41
Total	183.74	41.68

III. Final Action

EPA is approving the second 10-year update to the Victoria County 1-hour ozone maintenance plan.

We have evaluated the State's submittal and have determined that it meets the applicable requirements of the Clean Air Act and EPA regulations, and is consistent with EPA policy. Therefore, we are approving the request of TCEQ to revise the SIP for the Victoria County 1-hour ozone maintenance area.

EPA is publishing this rule without prior proposal because we view this as a noncontroversial amendment and anticipate no adverse comments. However, in the proposed rules section of this **Federal Register** publication, we are publishing a separate document that will serve as the proposal to approve the SIP revision if adverse comments are received. This rule will be effective on March 4, 2005 without further notice unless we receive adverse comment by February 2, 2005. If we receive adverse comments, we will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect. We will address all public comments in a subsequent final rule based on the proposed rule. We will not institute a second comment period on this action. Any parties interested in commenting must do so now. Please note that if we receive adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, we may adopt as final those provisions of the rule that are not the subject of an adverse comment.

IV. Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001). This action merely approves State law as meeting Federal requirements and imposes no additional requirements beyond those imposed by State law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule approves pre-existing requirements under State law and does not impose any additional enforceable duty beyond that required by State law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104–4).

This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have federalism implications because it does not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely approves a State rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045 ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because it is not economically significant.

In reviewing SIP submissions, EPA's role is to approve State choices, provided that they meet the criteria of

the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by March 4, 2005. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: December 17, 2004.

Richard E. Greene,

Regional Administrator, Region 6.

■ 40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart SS—Texas

■ 2. In § 52.2270, the table in paragraph (e) entitled ''EPA approved nonregulatory provisions and quasi-regulatory measures'' is amended by adding one new entry to the end of the table to read as follows:

§ 52.2270 Identification of plan.

* * * * *

(e) * * *

EPA APPROVED NONREGULATORY PROVISIONS AND QUASI-REGULATORY MEASURES IN THE TEXAS SIP

Name of SIP provision	Applicable geographic or nonattainment area	State approval/submittal date	EPA approval date	Comments
*	*	*	*	*
Second 10-year maintenance plan for Victoria County.	Victoria	02/05/03	01/03/05 [Insert *FR* page number where document begins].	

■ 3. Section 52.2275, Control strategy and regulations: Ozone, paragraph (e) is revised to read as follows:

§ 52.2275 Control strategy and regulations: Ozone.

* * * * *

(e) Approval—The Texas Commission on Environmental Quality (TCEQ) submitted a revision to the Texas SIP on February 18, 2003, concerning the Victoria County 1-hour ozone maintenance plan. This SIP revision was adopted by TCEQ on February 5, 2003. This SIP revision satisfies the Clean Air Act requirement, as amended in 1990, for the second 10-year update to the Victoria County 1-hour ozone maintenance area.

[FR Doc. 04–28700 Filed 12–30–04; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 73 and 76

[MM Docket No. 00–167; FCC 04–221]

Broadcast Services; Children's Television; Cable Operators

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document resolves a number of issues regarding the obligation of television broadcasters to protect and serve children in their audience. The document addresses matters related to two areas: the obligation of television broadcast licensees to provide educational and informational programming for children and the requirement that television broadcast licensees protect children from excessive and inappropriate commercial messages. The Commission goal is to provide television broadcasters with guidance regarding their obligation to serve children as we transition from an analog to a digital television environment, and to improve our children's programming rules and policies.

DATES: 47 CFR 73.670(a), (b) and (c) and Note 2, 47 CFR 73.673, and 47 CFR 76.225(b) and (c) are effective February 1, 2005. 47 CFR 73.670, Note 1; 47 CFR 73.671 (c)(6), (c)(7), (d), (e), and (f) and Note 2; and 47 CFR 76.225 (d) and Note 1 are effective January 1, 2006. 47 CFR 73.671(c)(5) and 47 CFR 73.3526(e)(11)(iii) contain information collection requirements that have not been approved by the Office of Management and Budget (OMB). The FCC will publish a document announcing the effective date for these sections.

ADDRESSES: Federal Communications Commission, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Kim Matthews, Media Bureau, (202) 418–2120.

SUPPLEMENTARY INFORMATION: This is a summary of the Federal Communications Commission's *Report and Order* in MM Docket No. 00–167, FCC 04–221, adopted September 9, 2004, and released November 23, 2004. The complete text of this document is available for inspection and copying during normal business hours in the FCC Reference Center, 445 12th Street, SW., Washington, DC 20554. The complete text may be purchased from the Commission's copy contractor, Qualex International, 445 12th Street, SW., Room CY–B402, Washington, DC 20554. The full text may also be downloaded at: *http://www.fcc.gov.* To request materials in accessible formats for people with disabilities (braille, large print, electronic file, audio format), send an e-mail to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

Paperwork Reduction Act: This document contains modified information collections subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. It will be submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the PRA. OMB, the general public, and other Federal agencies will be invited to comment on the modified and proposed information collection requirements contained in this proceeding.

Summary of the Report and Order and Further Notice of Proposed Rule Making

1. In this Report and Order we resolve a number of issues raised in the Notice of Proposed Rulemaking (65 FR 66951–01, November 8, 2000) regarding the obligation of television broadcasters to protect and serve children in their audience. We address matters related to two areas: The obligation of television broadcast licensees to provide educational and informational programming for children and the requirement that television broadcast licensees protect children from excessive and inappropriate commercial messages. For purposes of the Children's Television Act of 1990, which provides the basis for these limits on children's television commercial content, ''the term 'commercial television broadcast licensee' includes a cable operator, as defined in section 602 of the Communications Act of 1934 (47 U.S.C. 522).'' While some of the rules and policies we adopt herein apply only to digital broadcasters, others apply to both analog and digital broadcasters as well as cable operators. Our goals in resolving these issues are to provide television broadcasters with guidance regarding their obligation to serve children as we transition from an analog to a digital television environment, and to improve our children's programming rules and policies.

2. First, we address the obligation of digital television (''DTV'') broadcasters to provide children's educational and informational programming and, specifically, how that obligation applies to DTV broadcasters that use the multicast capability of their ATSC digital service to broadcast multiple program services. We adopt an approach pursuant to which digital broadcasters that choose to provide streams or hours of free video programming in addition to their required free over-the-air video program service will have an increased core programming benchmark roughly proportional to the additional amount of free video programming they choose to provide. Second, for both analog and digital broadcasters, we limit the number of preemptions allowed under our processing guideline to no more than 10 percent of core programs in each calendar quarter. A station that fails to meet the processing guideline because of excessive preemptions may still receive staff-level approval of its renewal application if it demonstrates that it has aired a package of educational and informational programming, including specials, PSAs, short-form programs, and regularly scheduled non-weekly programs with a significant purpose of educating and informing children, that demonstrates a commitment to educating and informing children at least equivalent to airing the amount of core programming indicated by the processing guideline. Licensees that do not qualify for staff level approval will have their license renewal applications referred to the Commission where they will have an additional opportunity to demonstrate compliance with the CTA. Third, we amend our rule regarding on-air identification of core programming to require both analog and digital broadcasters to identify such programming with the same symbol, E/I, which must be displayed throughout the program in order for the program to qualify as core educational programming. Fourth, we clarify that the children's television commercial limits and policies apply to all digital video programming directed to children ages 12 and under. Fifth, we interpret the commercial time limits to require that the display of Internet Web site addresses during program material is permitted as within the time limits only if the Web site meets certain requirements, including the requirement that it offer a substantial amount of bona fide program-related or other noncommercial content and is not primarily intended for commercial purposes. Sixth, we revise our definition of ''commercial matter'' to include promotions of television programs or video programming services other than children's educational and informational programming. Educational and Informational Programming.

Digital Core Children's Programming Processing Guideline

3. One of the questions posed in the Notice is how the current three-hour children's core educational programming processing guideline should apply to a DTV broadcaster that chooses to multicast. We asked if the processing guideline should apply to only one digital broadcasting program stream, to more than one program stream, or to all program streams the broadcaster chooses to provide. We also noted that DTV broadcasters may choose to devote a portion of their spectrum to either non-video services, such as datacasting, or to subscription video services available only to viewers who pay a fee, consistent with the requirement that they provide at least one free, over-the-air video program service to viewers. We asked whether the guideline should apply only to free broadcast services or also to services offered for a fee, and to video services only or also to non-video services. Finally, we asked how we should take into account the fact that DTV broadcasters have the flexibility to vary the amount and quality of broadcast programming they offer throughout the day. For example, a broadcaster could air 4 SDTV channels from 8 a.m. to 3 p.m., switch to two higher definition channels from 3 p.m. to 8 p.m., and finish with one HDTV channel for prime-time and late-night programming.

4. We have three main goals in crafting children's educational and informational programming rules for digital broadcasting. First, we want to ensure that the needs of children continue to be served ''through the licensee's overall programming.'' We agree with children's television advocates who strongly support the position that any increase in multicasting channel capacity that broadcasters choose to implement as a result of digital technology should translate to a commensurate increase in the amount of educational programming available to children. Second, we want to provide broadcasters with flexibility in meeting their children's core

programming obligations to permit them to explore the myriad potential uses of their broadcast spectrum made possible by digital technology. Third, we want to address what has been identified by many as a persistent problem in our rules and policies implementing the CTA: the continued lack of awareness on the part of parents and others of the availability of core programming. This concern about lack of public awareness of core programming applies to both the analog and digital broadcast environments.

5. The current 3 hours per week processing guideline was adopted with the one channel per broadcaster analog model in mind. With the advent of digital broadcasting and the multicasting ability that technology offers, a new method of quantifying the current core programming guideline for digital broadcasting is both necessary and appropriate. We also believe that whatever additional requirements we impose should be as concrete and quantifiable as possible to remove uncertainty and facilitate enforcement.

6. We adopt today an approach pursuant to which digital broadcasters that choose to provide additional channels or hours of free video programming in addition to their required free over-the-air video program service will have an increased core programming benchmark roughly proportional to the additional amount of free video programming they choose to provide. This approach is similar to that proposed by a number of commenters in response to the NOI and the Notice. Our revised guideline will work as follows. Digital broadcasters will continue to be subject to the existing three hours per week core programming processing guideline on their main program stream. DTV broadcasters that choose to provide additional streams or channels of free video programming will, in addition, have the following guideline applied to the additional programming: ½ hour per week of additional core programming for every increment of 1 to 28 hours of free video programming provided in addition to the main program stream. Thus, digital broadcasters providing between 1 and 28 hours per week of free video programming in addition to their main program stream will have a guideline of ½ hour per week of core programming in addition to the 3 hours per week on the main program stream. Digital broadcasters providing between 29 and 56 hours per week of free video programming in addition to their main program stream will have a guideline of 1 hour per week of core programming in addition to the 3 hours per week on the main program stream. Digital broadcasters providing between 57 and 84 hours per week of free video programming in addition to their main program stream will have a guideline of 1½ hours per week of core programming in addition to the 3 hours per week on the main program stream. The guideline will continue to increase in this manner for additional hours of free video programming. These benchmarks were derived by dividing the total number of hours in the week (168) by 6 (the number of ½ hour core programming increments required under our current guideline, as core programs must be at least 30 minutes in length), which equals 28. Thus, under the revised guideline, for every increment of 1 to 28 hours of additional free video programming offered in addition to the main digital program stream, the broadcaster must air at least an additional ½ hour of core programming. Another way to look at this is that for each full time stream of additional free video programming (24 hours day 7 days per week), the licensee must air an additional 3 hours per week of core programming.

7. Although we encourage stations to air more than an additional ½ hour per week of core programming for every increment of 28 hours of additional free video programming, in order to receive staff level approval of the CTA portion of their license renewal application under our revised processing guideline digital broadcasters must air at least ½ hour of core educational children's programming for every increment of 1 to 28 hours of free video programming provided in addition to the main program stream. As under our current processing guideline for the analog channel, a licensee will continue to be eligible for staff level approval if it demonstrates that it has aired a package of different types of educational and informational programming that, while containing somewhat less core programming than indicated by the revised guideline, demonstrates a level of commitment to educating and informing children at least equivalent to airing the amount of programming indicated by the guideline. In this regard, specials, PSAs, short-form programs, and regularly scheduled non-weekly programs with a significant purpose of educating and informing children may be counted toward the processing guideline. Licensees that do not meet these processing guidelines will be referred to the Commission, where they will have the opportunity to demonstrate compliance with the CTA in the same manner as under our current processing guideline.

8. To be considered core, the programming must comply with all of the requirements for core programming specified in our rules: that is, it must have serving the educational and informational needs of children ages 16 and under as a significant purpose; it must be aired between the hours of 7 a.m. and 10 p.m.; it must be a regularly scheduled weekly program; it must be at least 30 minutes in length; the educational and informational objective and the target child audience must be specified in writing the licensee's Children's Television Programming Report; and instructions for listing the program as educational/informational, including an indication of the age group for which the program is intended, must be provided by the licensee to publishers of program guides.

9. Our current 3 hours per week core programming processing benchmark is averaged over a six-month period in order to provide broadcasters with scheduling flexibility. We will also average the revised core programming processing benchmark to be applied to DTV broadcasters over a six-month period, thus providing some flexibility for digital broadcasters. The revised digital core programming guideline will become effective one year after release of this Report and Order.

10. We are concerned that digital broadcasters do not simply replay the same core programming in order to meet our revised processing guideline, particularly if broadcasters offer multiple streams of free video programming and thereby face a higher core programming guideline. We recognize, however, that to some degree children can benefit from repeated viewing of the same core program, as the educational lesson or message is reinforced. Accordingly, we will not prohibit all repeats of core programming by digital broadcasters under our revised guideline, but will require that at least 50 percent of core programming not be repeated during the same week to qualify as core. Under our current 3 hours per week processing guideline that applies to the analog channel, we allow repeats and reruns of core programming to be counted toward fulfillment of the guideline. We will exempt from this requirement any program stream that merely time shifts the entire programming line-up of another program stream. In addition, during the digital transition, we will not count as repeated programming core programs that are aired on both the analog station and a digital program stream.

11. In order to receive staff level approval of their license renewal application under our revised core programming processing guideline, digital broadcasters will be required to air at least three hours per week of core programming on their main program stream. To provide broadcasters with flexibility in choosing how best to serve their child audience, however, we will permit digital broadcasters to air all of their additional digital core programming, beyond the 3 hour baseline on the main digital program stream, on one free digital video channel or distribute it across multiple free digital video channels, at their discretion, as long as the stream/s on which the core programming is aired has comparable carriage on multichannel video programming distributors (''MVPDs'') as the stream whose programming generates the core programming obligation under the revised processing guideline. Educational and informational programming aired on subscription channels, however, will not be considered core under our processing guideline. In addition, the current three hours per week core programming processing guideline will continue to apply to analog stations until the analog channel is returned to the Commission at the end of the digital transition. Core programs aired on digital program streams will not be considered in evaluating whether a station has complied with the core programming processing guideline for its analog channel.

12. We agree with those commenters who argue that, in some cases, children and parents may be best served by having core programming available on a channel that is devoted to programming appropriate for child or family viewing during all or part of the programming day or week. We also agree that requiring every programming stream to carry core programming could discourage broadcasters from experimenting with innovative multicasting services. If, for example, alternative content streams are used to directly expand the value of the main stream through the broadcasting of associated information or different camera angles or the alternative streams are used for low bit rate video services such as a dedicated weather channel, they may not be appropriate for the carriage of children's programming. Moreover, we do not want to discourage broadcasters from providing highly specialized channels on which content directed to children might depart from the specialized focus. It is our expectation that broadcasters will develop such programming services. In the next three years, we intend to revisit the issues addressed in this Report and Order in another proceeding. At that time, we will consider, among other things, whether we should give broadcasters who choose to multicast more flexibility in terms of placement of core programming.

13. The revised guideline discussed above applies to digital broadcasters and the digital programming they provide. Up until the time that analog channels are returned to the Commission, we will continue to apply our current three hours per week core children's programming processing guideline to analog channels. Broadcasters will continue to file, on a quarterly basis, their Children's Television Programming Report, on FCC Form 398. We will revise current FCC Form 398 to permit broadcasters to report both analog and digital core programming on that form. Once the new form has been approved for use, we will issue a Public Notice informing broadcasters of the availability of the form and the date on which the revised form must begin to be used in place of the current form. On that date, reports will also be required to include information about digital core programming. As we have done in the analog context, we will continue to exempt noncommercial television licensees from children's programming reporting requirements with respect to their digital programming.

14. We also decline, at this time, to require high definition, interactivity, or other features made possible by digital technology to enhance core programming. We believe it would be premature to impose any requirement for use of technological advances in children's programming until broadcasters have had more opportunity to experiment with these features in other programming. However, we encourage broadcasters to provide high definition educational and informational programming for children as well as educational interactive features, to ensure that children benefit from the capabilities of digital technology. We agree with those commenters who argue that use of such features could improve the educational potential of core programming.

15. Finally, we disagree with those commenters that argue that the Commission lacks legal authority to impose new children's educational and informational programming requirements. As noted above, digital broadcasters are subject to the CTA's educational and informational programming requirements. In the 1996 Children's Programming Report and Order, we concluded that a safe harbor processing guideline approach to implementing the CTA is consistent with both the language and the intent of the statute. The revised quantitative processing guideline we adopt today for digital broadcasters is also consistent with the CTA and the First Amendment. In adopting the three hours per week core programming processing guideline for analog broadcasters, we concluded that defining what qualifies as programming ''specifically designed'' to serve the educational needs of children and giving broadcasters clear but nonmandatory guidance on how to guarantee compliance is a constitutional means of giving effect to the CTA's programming requirement. The actions we take today extend the current processing guideline to digital broadcasters and increase the guideline only for broadcasters who choose to use their digital capacity to air more free video programming. Broadcasters continue to retain wide discretion in choosing the ways in which they will meet their CTA obligations. Our new guideline imposes reasonable parameters on a broadcaster's use of the public airwaves and is narrowly tailored to advance the government's substantial, and indeed compelling, interest in the protection and education of America's children.

Preemption

16. Related to the issue of digital broadcasters' educational and informational programming obligations under the CTA is the issue of how we will treat preemptions of core programs by DTV broadcasters. To qualify as ''core programming'' for purposes of the three-hour-per-week processing guideline, the Commission requires that a children's program be ''regularly scheduled''; that is, a core children's program must ''be scheduled to air at least once a week'' and ''must air on a regular basis.'' In adopting the current educational programming rules, the Commission stated that television series typically air in the same time slot for 13 consecutive weeks, although some episodes may be preempted for programs such as breaking news or live sports events. The Commission noted that programming that is aired on a regular basis is more easily anticipated and located by viewers, and can build loyalty that will improve its chance for commercial success. The Commission stated that it would leave to the staff to determine, with guidance from the full Commission as necessary, what constitutes regularly scheduled

programming and what level of preemption is allowable.

17. We requested comment in the Notice on whether the Commission's policies regarding preemption of core programs should be revised in view of the greater programming capacity that will be available to DTV broadcasters. We noted that the ability of DTV broadcasters to multicast provides them with the option of airing multiple streams of programming simultaneously, thus increasing their flexibility to either avoid preempting core programs or to reschedule such programs to a regular ''second home.'' Given this capability, we asked if we should fashion a rule defining clearly the requirement that a ''core'' program be ''regularly scheduled,'' including the number of times a core program could be preempted and still count toward the three-hour-per-week processing guideline, and the efforts that must be made to reschedule and promote preempted programs in order for these programs to contribute toward the core programming guideline. If we were to adopt such a rule, we asked if we should continue to exempt from the requirement that core programs be rescheduled core programs preempted for breaking news. We also sought comment on the kind of rescheduling practices and promotion of rescheduled programs that we could require from digital broadcasters.

18. For both analog and digital broadcasters, to be considered core programming we will generally require that a preempted core program be rescheduled. In addition, we will consider, in determining whether the rescheduled program counts as a core educational program, the reason for the preemption, the licensee's efforts to promote the rescheduled program, the time when the rescheduled program is broadcast, and, as discussed below, the station's level of preemption of core programming. We will continue to exempt from the requirement that core programs be rescheduled core programs preempted for breaking news. Absent clear evidence that broadcasters are abusing this exemption, we intend to rely on broadcasters' journalistic judgment regarding the necessity of interrupting scheduled core programming because of a news alert.

19. As a general matter, for digital broadcasters we will not consider a core program moved to the same time slot on another of the station's digital program streams to be preempted as long as the alternate program stream receives MVPD carriage comparable to the stream from which the program is being moved and the station provides adequate on-screen information about the move, including when and where the program will air, on both the original and the alternate program stream. This policy applies only to program moves from one digital stream to another digital stream on the same station. Thus, as long as viewers are adequately notified of the move and the program is moved to a program stream that is accessible to a comparable number of viewers, broadcasters may use their multicasting capability to avoid preempting core programming.

20. For both analog and digital broadcasters, we will limit the number of preemptions under our processing guideline to no more than 10 percent of core programs in each calendar quarter. Each preemption beyond the 10 percent limit will cause that program not to count as core under the processing guideline, even if the program is rescheduled. We will exempt from this preemption limit preemptions for breaking news.

21. We believe that this preemption limit will help parents and children to locate core programming and to anticipate when it will be aired. We believe that most stations currently do not preempt more than 10 percent of core programs in each calendar quarter. We also note that our processing guideline is averaged over a six-month period, which will provide broadcasters with some scheduling flexibility. In addition, a station that fails to meet the processing guideline because of excessive preemptions may still receive staff-level approval of its renewal application if it demonstrates that it has aired a package of educational and informational programming, including specials, PSAs, short-form programs, and regularly scheduled non-weekly programs with a significant purpose of educating and informing children, that demonstrates a commitment to educating and informing children at least equivalent to airing the amount of core programming indicated by the processing guideline. Licensees that do not qualify for staff level approval will have their license renewal applications referred to the Commission where they will have an additional opportunity to demonstrate compliance with the CTA.

Identification of Core Programming

22. As we stated in the NPRM, studies of the effectiveness of our educational programming requirements show a continued lack of awareness on the part of parents regarding the availability of core programming. As one study observed:

> Information about E/I programs remains hard for parents to find. Although commercial broadcasters are consistently using E/I icons, the on-air information is often brief and difficult to identify. Printed listing services do not carry the information. * * * Thus, there is a serious lack of information for parents about core educational and informational offerings, mostly because the popular press does not appear to be interested in or have the capacity to publish such information. Not surprisingly, only one in seven parents is able to correctly identify the meaning of the E/I symbol.

23. As we noted when we adopted the current children's educational programming rules in 1996, parents can increase the audience of an educational program by encouraging their children to watch the show, but can only do so if they know in advance when the show will air and that the show is educational. The public information initiatives adopted by the Commission in 1996 were designed to maximize public access to information about core programming while minimizing the cost to licensees. In adopting the current on-air identification requirement, the Commission noted that on-air identifiers were likely to reach a larger audience than information published in program guides, at minimal cost to stations. We continue to believe that on-air identification of core programming is a cost-effective means of ensuring that core programming reaches the child audience, but agree with those commenters that argue that the use of different identifiers by different broadcasters is confusing parents and impairing their ability to choose core programming for their children.

24. Accordingly, we will amend our rules regarding on-air identification of core programming to require both analog and digital broadcasters to identify such programming with the same symbol: E/I. We will also require that this symbol be displayed throughout the program in order for the program to qualify as core. We believe this change to our on-air identification requirement will not prove onerous to broadcasters, who already use on-screen identifiers for core programs, and could greatly improve the public's ability to recognize and locate core programs. We note that broadcasters now display icons and other on-screen information with increasing frequency in many kinds of programming, and the public is increasingly used to seeing such information displayed along with program material. Broadcasters' increasing voluntary use of onscreen identifiers, such as network logos, presumably reflects their judgment as to the effectiveness of this technique in communicating information. We believe that broadcasters can display the E/I

icon in an unobtrusive manner that will help parents and others identify core programs without deterring potential child viewers.

25. We will apply this revised on-air identification requirement to both commercial and noncommercial broadcasters. Although we have previously exempted noncommercial licensees from the requirement that they identify core programming, we believe that requiring all broadcasters to use the E/I symbol throughout the program to identify core programming will help reinforce viewer awareness of the meaning of this symbol. We will, however, continue to exempt noncommercial television licensees from the other public information initiatives adopted in the 1996 Children's Programming Report and Order. Thus, noncommercial television stations will not be required to prepare and file quarterly Children's Television Programming Reports or to provide information identifying programming specifically designed to educate and inform children to publishers of program guides. As is our current practice, we will require noncommercial broadcast stations to maintain documentation sufficient to show compliance with the CTA's programming obligations at renewal time in response to a challenge or to specific complaints.

Commercial Limits

Application of Existing Commercial Limits Rules and Policies to DTV

26. We sought comment in the Notice on how the limits on the amount of commercial matter in children's programming should apply in the digital environment and how we should interpret with respect to DTV broadcasters the policies set forth in the 1974 Policy Statement on children's programming. We asked whether children's advertising limits and policies should apply only to free over-the-air channels, or to all digital channels, both fee and pay. We sought comment specifically on the proposal by CME, *et al.* that the Commission prohibit all direct links to commercial Web sites during children's programming. If we were to permit certain kinds of commercial links during children's programs, we asked if such links should be permitted to appear during the program itself, or be limited to appearing during commercials adequately separated from program material as required by our separations policy.

27. We will apply the commercial limits and policies, as clarified in today's Order, to all digital video programming directed to children ages 12 and under, whether that programming is aired on a free or pay digital stream. We note that the commercial limits and policies currently apply to cable operators and DBS providers and that cable operators are defined as ''broadcast licensees'' for purposes of the commercial matter limitations in the CTA. Therefore, the application of such limits and policies to pay broadcast channels provides for consistent treatment of these program delivery systems for purposes of children's advertising restrictions. We agree with those commenters that argue that the same concerns that led to adoption of the advertising restrictions in the 1974 Policy Statement and the CTA—the unique vulnerability of children as television viewers—apply regardless of the channel that a child viewer watches. Thus, any advertising restrictions for children's programming should apply to all such programming, regardless of the free or pay status of the channel. This determination is both consistent with and required by Section 336 of the Communications Act, which states that the Commission ''shall adopt regulations that allow the holders of [DTV] licenses to offer such ancillary and supplementary services on designated frequencies as may be consistent with the public interest, convenience and necessity.'' Providing programs intended for children that do not comply with the advertising limits or commercial policies is contrary to the public interest because they could expose children to excessive and abusive advertising practices.

28. We are aware that some broadcasters are currently displaying Internet Web site addresses that appear during children's program material (for example, in a crawl at the bottom of screen) which raises the issue of how the CTA commercial time limits should apply. We are concerned that the display of such addresses for Web sites established solely for commercial purposes in children's programs is inconsistent with our mandate under the CTA to protect children, who are particularly vulnerable to commercial messages and incapable of distinguishing advertising from program material. This is a concern that arises with respect to all broadcasters, both analog and digital, and to cable operators. Accordingly, we adopt a proposal similar to that advanced by Sesame Workshop with respect to this display of commercial Web site information in children's programs. Specifically, we will interpret the CTA commercial time limits to require that, with respect to programs directed to children ages 12 and under, the display of Internet Web site addresses during program material is permitted as within the CTA limitations only if the Web site: (1) Offers a substantial amount of bona fide program-related or other noncommercial content; (2) is not primarily intended for commercial purposes, including either e-commerce or advertising; (3) the Web site's home page and other menu pages are clearly labeled to distinguish the noncommercial from the commercial sections; and (4) the page of the Web site to which viewers are directed by the Web site address is not used for e-commerce, advertising, or other commercial purposes (*e.g.,* contains no links labeled ''store'' and no links to another page with commercial material).

29. For Web sites meeting these requirements, we will not limit the amount of time that the Web site address may be displayed during children's programs. In addition, we will permit the commercial portions of Web sites that comply with these requirements to sell or advertise products associated with the related television program. Because we require that permissible Web sites clearly separate the commercial portions of the site from the site's other content, we believe that children will be adequately protected from program-related merchandise sales. Because of the unique vulnerability of young children to host-selling, however, we will prohibit the display of Web site addresses in children's programs when the site uses characters from the program to sell products or services. This restriction on Web sites that use host-selling applies to Web site addresses displayed both during program material and during commercial material. We do not impose other restrictions at this time on the use of Web site addresses displayed only during commercials aired in children's programs.

30. We believe that this approach to the display of Web site addresses in programs directed to children ages 12 and under fairly balances the interest of all broadcasters in exploring the potential uses of the Internet in connection with their children's programs with our mandate to protect children from over commercialization. We will require a broadcaster that chooses to air children's programs displaying Web site addresses during program material to certify, as part of its certification in its license renewal application of compliance with the commercial limits on children's

programming, that it has also complied with the requirements concerning the display of Web site addresses in such programming. In addition, these broadcasters will be required to maintain in their public inspection file, until final action has been taken on the station's next license renewal application, records sufficient to substantiate the station's certification of compliance with the restrictions on Web site addresses in programs directed to children ages 12 and under. Cable operators airing children's programming must maintain records sufficient to verify compliance with these new rules and make such records available to the public. Such records must be maintained by cable operators for a period sufficient to cover the limitations period specified in 47 U.S.C. 503(b)(6)(B).

31. With respect to the appearance of direct, interactive, links to commercial Internet sites in children's programming, we agree with those commenters that express concern that prohibiting such links at least at this stage in the digital transition is premature and unnecessary and could hamper the ability of broadcasters to experiment with potential uses of interactive capability in children's programming. There is little if any use of direct Internet connectivity today in television programming of the type that was contemplated when the Notice in this proceeding was issued. Accordingly, we find that it would be premature and unduly speculative to attempt to regulate such direct connectivity at this time. We agree that direct links to Web sites with program-related material could provide beneficial educational and informational content in children's programs and do not wish to place unnecessary barriers in the way of technical developments in this area that may take place.

32. We encourage broadcasters to experiment with the capabilities digital television offers by developing interactive services that can be used to enhance the educational value of children's programming. With the benefits of interactivity, however, come potential risks that children will be exposed to additional commercial influences. We therefore seek comment in the Further Notice of Proposed Rulemaking that is part of this Report and Order about what kinds of services broadcasters and cable operators are developing and what rules would be appropriate to adopt. During the pendancy of this proceeding, however, we emphasize that broadcasters and cable operators may not circumvent our rules on commercial limits through technological developments in interactivity. We encourage broadcasters and cable operators to innovate and experiment with new uses of interactive technology that is educational in nature.

Definition of Commercial Matter

33. The Notice also invited commenters to address a broader question related to our restriction on the duration of advertising during children's programming. This issue arises with respect to both analog and digital programming. We noted that, under our current policy, the limitation of 10.5 minutes per hour on weekends and 12 minutes per hour on weekdays applies to ''commercial matter.'' ''Commercial matter'' is defined to exclude certain types of program interruptions from counting toward the commercial limits, including promotions of upcoming programs that do not mention sponsors, public service messages promoting not-for-profit activities, and air-time sold for purposes of presenting educational and informational material. We observed in the Notice that there is a significant amount of time devoted to these types of announcements in children's programming, thereby often reducing the amount of time devoted to actual program material to an amount far less than the limitation on the duration of commercial matter alone might suggest.

34. Accordingly, we invited comment in the Notice on whether the Commission should revise its definition of ''commercial matter'' to include some or all of these types of program interruptions that do not currently contribute toward the commercial limits. We noted that some of the types of program interruptions currently excluded from the commercial limits may contain information valuable to children, such as promotion of upcoming educational programs or certain types of public service messages. We asked if we should nonetheless require that the time devoted to these announcements count toward the commercial limits to maximize the amount of time devoted to program material and reduce the time taken by interruptions. We also asked whether, if we were to revise our definition of ''commercial matter,'' we should apply the new definition only to digital broadcasting or also to analog broadcasting. Finally, we asked commenters to address whether our ability to revise this definition is restricted by the CTA and its legislative history.

35. We will revise our definition of ''commercial matter'' to include promotions of television programs or video programming services other than children's educational and informational programming. This revised definition will apply to analog and digital television stations and to cable operators. In the Further Notice of Proposed Rulemaking that is part of this Report and Order, we also propose to apply this revised definition to Direct Broadcast Satellite service providers. Our goals in making this revision to the definition of commercial matter are to reduce the number of commercial interruptions in children's programming and encourage the promotion of educational and informational programming for children.

36. We agree with those commenters who argue that program promotions should fall within the scope of commercial matter because the station broadcasting the promotion receives significant consideration for airing these advertisements: specifically, the increased audiences for the promoted program which presumably leads to increased advertising rates for the station. Reducing the number of program promotions will help protect children from overcommercialization of programming consistent with the overall intent of Congress in the CTA. At the same time, exempting program promotions for children's educational and informational programming may encourage broadcasters to promote this programming, thereby increasing parents' awareness of the programming and possibly the program's audience, and thus extending the educational benefit of the programming. As noted above, there is evidence of a continued lack of awareness on the part of parents regarding the availability of core programming. Our action may lead to additional promotion of children's educational and informational programming, including core programming, thereby helping to address this problem.

37. This decision is consistent with the CTA and its legislative history. The term ''commercial matter'' is not defined in the CTA. The House and Senate Reports state that the definition should be ''consistent'' with the definition used in former Form 303–C, which defined commercial matter to include, among other things, promotional announcements by commercial stations for or on behalf of another commonly owned or controlled broadcast station serving the same community. Including program promotions in the definition of commercial matter is consistent with this aspect of the definition of commercial matter on former Form 303–

C, as in either case the station is receiving indirect consideration for the program promotion.

Inappropriate Promotions in Children's Programming

38. Another issue raised both in the Notice and in the NOI relates to the airing, in programs viewed by children, of promotions for other upcoming programs that may be unsuitable for children to watch because either the promotions themselves or the programs they refer to contain sexual or violent content or inappropriate language. This issue arises with respect to both analog and digital broadcasting and applies not only to educational and informational children's programming but to any programming that is viewed by a substantial number of children. We sought comment in the Notice on steps the Commission could take to ensure that programs designed for children or families do not contain promotions that are unsuitable for children to watch. We noted that the broadcast, cable, and motion picture industries voluntarily rate video programming that contains sexual, violent, or other indecent material and broadcast signals containing these ratings so that these programs can be screened by ''V-Chip'' technology available in television sets. The ratings identify the age group for which a particular program is suitable and indicate when the program contains violence, sexual content, or suggestive or coarse language. We asked in the Notice whether the ratings of programs promoted by broadcasters should be consistent with the ratings of the program during which the promotions run. We also asked whether we should require that promotions themselves be rated and encoded so they can be screened by V-Chip technology, or that promotions be rated and that programs with a significant child audience contain only promotions consistent with the rating of the program in which they appear.

39. In light of the consensus among commenters that voluntary efforts rather than Commission action are preferable to ensure that age-inappropriate promotions are not aired in children's programs, we will not take action on this issue at this time. Instead, we urge broadcasters to ensure that industry mechanisms are in place and are used effectively to prevent the airing of promotions in children's programs that are inappropriate for child viewing. We also urge the public to continue to monitor promotions aired in children's programming and to notify us of instances in which broadcasters air age-inappropriate promotions. If we receive information suggesting that age-inappropriate promotions have become a systemic problem, we will revisit this issue.

40. We agree with those commenters that argue that DTV technical standards should not foreclose the implementation of changes to or improvements in the V-Chip system. We also believe that DTV technical standards should not foreclose the option of using V-Chip technology to support multiple rating systems. In our Report and Order in the Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television, we adopted rules to ensure that V-Chip functionality is available in the digital world. In that proceeding, we stated our belief that the ability to modify the content advisory rating system is beneficial and required that television receivers be able to process new ratings should they be developed. We also adopted standards that do not preclude manufacturers from incorporating additional blocking standards or techniques into receivers, thereby permitting manufacturers to develop V-Chip technology that can be used in conjunction with additional ratings systems.

41. We will not at this time adopt the other V-Chip proposals advanced by commenters. Nonetheless, we encourage broadcasters to consider various ways of improving V-Chip utility, including making available in their programming a link to a Web site where parents and other viewers can get additional information about program ratings and the V-Chip, once such technology or functionality is available to consumers. We also encourage the broadcast, cable, and motion picture industries to consider whether any revisions to the ratings system would make it more accurate and easier to understand.

42. In our next periodic review of the status of the digital transition, we plan to address whether we should require digital broadcasters to embed E/I information in the core program stream so that this information can be sought by V-Chip or other technology. Given the lack of information in the record of this proceeding about how this information would be used and the potential benefits of this technology in helping parents locate core programming, and the potential costs such a requirement would impose, we do not address this issue today.

Future Proceedings

43. We intend to revisit the issues addressed in this item in the next three years and consider whether the determinations made herein should be changed in light of technological developments. In particular, we will consider whether broadcasters should be given more flexibility to determine the program stream on which core programming is placed.

44. In addition, we intend to issue a Public Notice in the near future seeking comment on whether broadcasters are complying with the letter and intent of the CTA in terms of, among other things, the amount and quality of core children's programming being provided and the extent of preemption of such programming. The Commission staff also intends to conduct a review of broadcaster compliance with the CTA and our rules and to issue a report on the results of this review and the comments filed in response to the Public Notice. The Commission last issued a report on compliance with the CTA in 2001. The Commission plans to conduct similar reviews and issue similar reports on a regular basis roughly every three years.

Effective Dates and Transition Period

45. Our revised policies and rules regarding application of the commercial limits and policies to digital programming as well as those regarding the display of Internet addresses in analog and digital programming and in programming aired by cable operators, will become effective February 1, 2005. We will begin to evaluate compliance with these requirements in renewal applications filed after that date. Thus, the first renewal applications to which these new requirements will be applied are those required to be filed by April 1, 2005, by television stations located in the states of Indiana, Kentucky, and Tennessee. Licensee performance during any portion of the renewal term that predates February 1, 2005, will be evaluated under the current rules and policies and performance that post-dates the rules will be judged under the new provisions.

46. Our rules regarding on-air identification of core programming will become effective after approval by the Office of Management and Budget (''OMB'') under the Paperwork Reduction Act of 1995 (''PRA''). Upon OMB approval, we will issue a Public Notice announcing the effective date of this rule. The effective date will be no earlier than February 1, 2005. Similarly, we will issue a Public Notice announcing when the revised FCC Form 398, also subject to OMB approval under the PRA, will be available for use by licensees and when licensees must commence using the revised form to report digital core programming.

47. Our revised definition of commercial matter will become effective January 1, 2006. This transition period will give programmers time to produce sufficient children's programming and other material to include within children's programming that would not be considered commercial matter. Similarly, our revised safe harbor processing guideline for digital broadcasters will become effective January 1, 2006. The limit on the number of preemptions for digital broadcasters under our processing guideline to no more than 10 percent of core programs in each calendar quarter and the limit for digital broadcasters on the number of repeats of core programming to no more than 50 percent of core programming during the same week will also become effective January 1, 2006. These requirements relate to the calculation of hours of core programming under our revised guideline and therefore should become effective at the same time as the revised guideline. In addition, to give analog broadcasters time to come into compliance with our rule limiting the number of preemptions under the current analog processing guideline to no more than 10 percent of core programs in each calendar quarter, we will also delay the effective date of that rule as applied to analog broadcasters until January 1, 2006. We believe that this transition period is appropriate to give licensees time to develop programming or to renegotiate or allow expiration of existing program contracts as necessary. Renewal applications filed earlier than January 1, 2006, will be evaluated for compliance with the CTA based on our current rules and the policies expressed in the 1996 Children's Programming Report and Order and the 1991 Report and Order, as modified upon reconsideration. License renewal applications filed after January 1, 2006, will be evaluated to determine whether broadcasters are providing core programming using the revised definition of commercial matter and processing guideline adopted herein and are complying with the revised rules concerning preemption and repeats of core programming. Thus, the first renewal applications to which these new requirements will be applied are those required to be filed by February 1, 2006, by stations located in the states of Kansas, Nebraska, and Oklahoma. Licensee performance during any portion of the renewal term that predates January 1, 2006, will be evaluated under the current rules and policies and performance that post-dates the new rules will be judged under the new provisions.

Conclusion

48. We adopt this Report and Order and Further Notice of Proposed Rule Making to address the obligation of DTV broadcasters under the CTA to air educational programming for children and to protect children from excessive and inappropriate commercial messages. Our goals are to ensure that parents and children benefit from broadcasters' use of digital technology to provide multiple broadcast streams and to permit broadcasters flexibility to explore the potential uses of the broadcast spectrum made possible by digital technology, including the use of direct Web site links in children's programming, consistent with the mandate of the CTA. We believe that the rules and policies adopted herein further the mandate of the CTA that broadcast television fulfill its potential to teach the nation's children and that broadcasters protect children from over commercialization.

VII. Administrative Matters

49. This Report and Order contains new or modified information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. It will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new or modified information collection(s) contained in this proceeding. Written comments by the public on the proposed new and modified information collection(s) are due 60 days from date of publication of this Report and Order in the **Federal Register**. In addition to filing comments with the Secretary, a copy of any comments on the information collection(s) contained herein should be submitted to Cathy Williams, Federal Communications Commission, Room 1–C823, 445 12th Street, SW., Washington, DC 20554, or via the Internet to *Cathy Williams@fcc.gov,* and to Kristy L. LaLonde, OMB Desk Officer, Room 10234 NEOB, 725 17th Street, NW., Washington, DC 20503, or via the Internet to *KristyL. LaLonde@omb.eop.gov,* or via fax at 202–395–5167.

50. As required by the Regulatory Flexibility Act,[1] the Commission has prepared a Final Regulatory Flexibility Analysis (''FRFA'') relating to this Report and Order. The FRFA is set forth below.

51. The Commission will send a copy of the Report and Order in a report to be sent to Congress and the General Accounting Office pursuant to the Congressional Review Act, see 5 U.S.C. 801(a)(1)(A).

52. For additional information on this proceeding, please contact Kim Matthews, Policy Division, Media Bureau at (202) 418–2154.

Final Regulatory Flexability Analysis

53. As required by the Regulatory Flexibility Act of 1980, as amended (''RFA''), an Initial Regulatory Flexibility Analysis (''IRFA'') was incorporated in the Notice of Proposed Rule Making (''NPRM''). The Commission sought written public comment on the proposals in the Notice, including comment on the IRFA. One comment was received on the IRFA. This Final Regulatory Flexibility Analysis (''FRFA'') conforms to the RFA.

I. Need for, and Objectives of, the Report and Order

The purpose of this proceeding is to determine how the existing children's educational television programming obligations and limitations on advertising in children's programs should be interpreted and adapted to apply to digital television broadcasting in light of the new capabilities made possible by that technology. First, we address the obligation of digital television (''DTV'') broadcasters to provide children's educational and informational programming and, specifically, how that obligation applies to DTV broadcasters that use the multicast capability of their ATSC digital service to broadcast multiple program services. We adopt an approach pursuant to which digital broadcasters that choose to provide streams or hours of free video programming in addition to their required free over-the-air video program service will have an increased core programming benchmark roughly proportional to the additional amount of free video programming they choose to provide. Second, for both analog and digital broadcasters, we limit the number of preemptions allowed under our processing guideline to no more than 10 percent of core programs in each calendar quarter. Third, we amend our rule regarding on-air identification of core programming to require both analog and digital broadcasters to identify such programming with the same symbol, E/I, which must be displayed throughout the program in order for the program to qualify as core

[1] *See* 5 U.S.C. § 604.

educational programming. Fourth, we clarify that the children's television commercial limits and policies apply to all digital video programming directed to children ages 12 and under. Fifth, we interpret the commercial time limits to require that the display of Internet Web site addresses during program material is permitted as within the time limits only if the Web site meets certain requirements, including the requirement that it offer a substantial amount of bona fide program-related or other noncommercial content and is not primarily intended for commercial purposes. Sixth, we revise our definition of ''commercial matter'' to include promotions of television programs or video programming services other than children's educational and informational programming. Finally, we seek comment on several additional proposals concerning the children's programming commercial limits and indicate our intention to issue a Public Notice in the near future seeking comment on broadcaster compliance with the Children's Television Act of 1990 (''CTA''). Our objectives in resolving these issues are to provide television broadcasters with guidance regarding their obligation to serve children as we transition from an analog to a digital television environment and to improve our children's programming rules and policies.

II. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

The U.S. Small Business Administration (''SBA'') filed the only comment in this proceeding responding to the IRFA. According to the SBA, the IRFA does not satisfy the requirements of the RFA, as it does not describe many of the ''compliance requirements'' contained in the NPRM and their impact on small firms. The SBA also argues that the IRFA does not discuss significant alternatives that would accomplish the objectives while minimizing the significant economic impact on small entities. SBA states that it does not question the Commission's goals in this proceeding, but instead asks that the Commission seek ways to minimize the burdens on small business while still accomplishing its goals.

The NPRM described a number of possible ways of applying the current core programming processing guideline to digital broadcasters. These proposals were suggested by commenters responding to the NOI in this docket. It was not possible for the Commission to develop detailed estimates of the cost of adopting each of these proposals because the details of how any of the proposals would be implemented were not known. The NPRM sought comment on these various proposals in large part to determine, in the view of broadcasters and others, which would be the preferable means of adapting our current rules. Commenters responding to the NPRM address, among other issues, the cost of the various proposals and the advantages, from cost and other perspectives, of the approach they advocate. In determining what approach to adopt, the Commission carefully considered all of the comments, particularly those offering less burdensome means of accomplishing our stated objectives. The approach adopted in the Report and Order attempts to balance the need to adapt our current rules to the digital environment and to improve our children's programming rules and policies with the need to minimize costs where possible and provide broadcasters with flexibility to continue to explore different ways of employing digital technology.

III. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply

The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the rules. The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction'' under section 3 of the Small Business Act. In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. A small business concern is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.

Television Broadcasting. The Small Business Administration defines a television broadcasting station that has no more than $12 million in annual receipts as a small business. Business concerns included in this industry are those ''primarily engaged in broadcasting images together with sound.'' According to Commission staff review of the BIA Publications, Inc. Master Access Television Analyzer Database as of May 16, 2003, about 814 of the 1,220 commercial television stations in the United States have revenues of $12 million or less. We note, however, that, in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies.

In addition, an element of the definition of ''small business'' is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply do not exclude any television station from the definition of a small business on this basis and are therefore over-inclusive to that extent. Also as noted, an additional element of the definition of ''small business'' is that the entity must be independently owned and operated. We note that it is difficult at times to assess these criteria in the context of media entities and our estimates of small businesses to which they apply may be over-inclusive to this extent.

There are also 380 non-commercial TV stations in the BIA database. Since these stations do not receive advertising revenue, there are no revenue estimates for these stations. We believe that virtually all of these stations would be considered ''small businesses'' given that they are generally owned by non-commercial entities including local schools and governments and, for the most part, rely on public donations and funding.

Cable Operators. The SBA has developed a small business size standard for cable and other program distribution services, which includes all such companies generating $12.5 million or less in revenue annually. The Commission has developed, with SBA's approval, our own definition of a small cable system operator for the purposes of rate regulation. Under the Commission's rules, a ''small cable company'' is one serving fewer than 400,000 subscribers nationwide. We last estimated that there were 1,439 cable operators that qualified as small cable companies. Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, we estimate that there are fewer than 1,439 small entity cable system operators that may be affected by the decisions and rules in this Report and Order.

The Communications Act, as amended, also contains a size standard for a small cable system operator, which

is ''a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1% of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000.'' The Commission has determined that there are 68,500,000 subscribers in the United States. Therefore, an operator serving fewer than 685,000 subscribers shall be deemed a small operator if its annual revenues, when combined with the total annual revenues of all of its affiliates, do not exceed $250 million in the aggregate. Based on available data, we find that the number of cable operators serving 685,000 subscribers or less totals approximately 1,450. Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed $250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

IV. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

The Order adopts a revised core children's programming processing guideline for digital television broadcasters. Our revised guideline will work as follows. Digital broadcasters providing only one stream of free digital video programming will continue to be subject to the existing 3 hours per week core programming processing guideline. DTV broadcasters that choose to provide additional streams or channels of free video programming will, in addition, have the following guideline applied to the additional programming: ½ hour per week of additional core programming for every increment of 1 to 28 hours of free video programming provided in addition to the main program stream. Thus, digital broadcasters providing between 1 and 28 hours per week of free video programming in addition to their main program stream will have a guideline of ½ hour per week of core programming in addition to the 3 hours per week on the main program stream. Digital broadcasters providing between 29 and 56 hours per week of free video programming in addition to their main program stream will have a guideline of 1 hour per week of core programming in addition to the 3 hours per week on the main program stream. Digital broadcasters providing between 57 and 84 hours per week of free video programming in addition to their main program stream will have a guideline of 1½ hours per week of core programming in addition to the 3 hours per week on the main program stream. The guideline will continue to increase in this manner for additional hours of free video programming. In addition, for digital broadcasters, we will require that at least 50 percent of core programming not be repeated during the same week to qualify as core.

The revised guideline discussed above applies to digital broadcasters and the digital programming they provide. Up until the time that analog channels are returned to the Commission, we will continue to apply our current 3 hours per week core children's programming processing guideline to analog channels. Broadcasters will continue to file, on a quarterly basis, their Children's Television Programming Report, on FCC Form 398. We will revise current FCC Form 398 to permit broadcasters to report both analog and digital core programming on that form. Once the new form has been approved for use, we will issue a public notice informing broadcasters of the availability of the form and the date on which the revised form must begin to be used in place of the current form. On that date, reports will also be required to include information about digital core programming. As we have done in the analog context, we will continue to exempt noncommercial television licensees from children's programming reporting requirements with respect to their digital programming.

As a general matter, for digital broadcasters we will not consider a core program moved to the same time slot on another of the station's digital program streams to be preempted as long as the alternate program stream receives MVPD carriage comparable to the stream from which the program is being moved and the station provides adequate on-screen information about the move, including when and where the program will air, on both the original and the alternate program stream. Thus, as long as viewers are adequately notified of the move and the program is moved to a program stream that is accessible to a comparable number of viewers, broadcasters may use their multicasting capability to avoid preempting core programming. For both analog and digital broadcasters, however, we will limit the number of preemptions under our processing guideline to no more than 10 percent of core programs in each calendar quarter. Each preemption beyond the 10 percent limit will cause that program not to count as core under the processing guideline, even if the program is rescheduled. We will exempt from this preemption limit preemptions for breaking news.

In addition, the item amends our rules regarding on-air identification of core programming to require both analog and digital broadcasters to identify such programming with the same symbol: E/I. We will also require that this symbol be displayed throughout the program in order for the program to qualify as core. We will apply this revised on-air identification requirement to both commercial and noncommercial broadcasters.

The item applies the commercial limits and policies to all digital video programming directed to children ages 12 and under, whether that programming is aired on a free or pay digital stream. In addition, we interpret the CTA commercial time limits to require that, for both analog and digital broadcasters, with respect to programs directed to children ages 12 and under, the display of Internet Web site addresses during program material is permitted as within the CTA limitations only if the Web site: (1) Offers a substantial amount of bona fide program-related or other noncommercial content; (2) is not primarily intended for commercial purposes, including either e-commerce or advertising; (3) the Web site's home page and other menu pages are clearly labeled to distinguish the noncommercial from the commercial sections; and (4) the page of the Web site to which viewers are directed by the Web site address is not used for e-commerce, advertising, or other commercial purposes (*e.g.*, contains no links labeled ''store'' and no links to another page with commercial material). Finally, the item also revises our definition of ''commercial matter'' to include promotions of television programs or video programming services other than children's educational and informational programming.

V. Steps Taken To Minimize Significant Economic Impact on Small Entities and Significant Alternatives Considered

Several steps were taken to minimize significant impact on small entities. For the many broadcasters simulcasting the core programming offered on their analog channel on a single digital program stream and offering no other digital free video programming, compliance with the new processing guideline should be automatic, as the digital stream will simulcast the core programming aired on the analog stream and the current 3 hours/week guideline will apply to both streams. For broadcasters choosing to provide additional streams of digital free video

programming, the revised guideline establishes a series of graduated benchmarks which increase the core programming obligation in relation to the number of hours of additional free video programming offered by the licensee. Thus, only those stations choosing to provide additional free video programming are subject to the revised processing guideline. We rejected the ''pay or play'' and ''menu'' alternatives to the revised guideline largely because these approaches were more administratively burdensome to stations. Under the current and revised guideline, stations have and will continue to have the option of sponsoring core programming on other stations in the market.

In addition, for digital broadcasters we require under the new processing guideline that at least 50 percent of core programming not be repeated during the same week to qualify as core. However, we exempt from this requirement any program stream that merely time shifts the entire programming line-up of another program stream. Also, during the transition, we will not count as repeated programming core programs that are aired on both the analog station and a digital program stream.

For both analog and digital broadcasters, however, the item limits the number of preemptions under our processing guideline to no more than 10 percent of core programs in each calendar quarter. We exempt from this preemption limit preemptions for breaking news, however. We believe that most stations currently do not preempt more than 10 percent of core programs in each calendar quarter. We also note that our processing guideline is averaged over a six-month period, which will provide broadcasters with some scheduling flexibility. In addition, a station that fails to meet the processing guideline because of excessive preemptions may still receive staff-level approval of its renewal application if it demonstrates that it has aired a package of educational and informational programming, including specials, PSAs, short-form programs, and regularly scheduled non-weekly programs with a significant purpose of educating and informing children, that demonstrates a commitment to educating and informing children at least equivalent to airing the amount of core programming indicated by the processing guideline. Licensees that do not qualify for staff level approval will have their license renewal applications referred to the Commission where they will have an additional opportunity to demonstrate compliance with the CTA.

Although we have previously exempted noncommercial licensees from the requirement that they identify core programming, we believe that requiring all broadcasters to use the E/I symbol throughout the program to identify core programming will help reinforce viewer awareness of the meaning of this symbol. We will, however, continue to exempt noncommercial television licensees from the other public information initiatives adopted in the 1996 Children's Programming Report and Order. Thus, noncommercial television stations will not be required to prepare and file quarterly Children's Television Programming Reports or to provide information identifying programming specifically designed to educate and inform children to publishers of program guides. As is our current practice, we will require noncommercial broadcast stations to maintain documentation sufficient to show compliance with the CTA's programming obligations at renewal time in response to a challenge or to specific complaints. We also decline to require licensees to use high definition, interactivity, or other features to enhance core programming.

Although the Order limits the display in children's programming of Internet Web site addresses to sites established solely for commercial purposes, it does not prohibit the display of all Web site addresses. In addition, the item does not prohibit direct Internet links in children's programs as several commenters advocated. This approach was adopted in an attempt to balance the interest of digital broadcasters in exploring the potential uses of interactivity with our mandate to protect children from over commercialization. The Order also declines to do more than urge voluntary action on the part of broadcasters to ensure that age-inappropriate promotions are not aired in children's programs.

VI. Report to Congress

The Commission will send a copy of the Report and Order, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act, see 5 U.S.C. 801(a)(1)(A). In addition, the Commission will send a copy of the Report and Order, including this FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the Report and Order and FRFA (or summaries thereof) will also be published in the **Federal Register**. See 5 U.S.C. 604(b).

List of Subjects

47 CFR Part 73

Television.

47 CFR Part 76

Cable television.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Rule Changes

■ For the reasons discussed in the preamble 47 CFR Parts 73 and 76 of the Code of Federal Regulations are amended as follows:

PART 73—RADIO BROADCAST SERVICES

■ 1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334, and 336.

■ 2. Section 73.670 is revised to read as follows:

§ 73.670 Commercial limits in children's programs.

(a) No commercial television broadcast station licensee shall air more than 10.5 minutes of commercial matter per hour during children's programming on weekends, or more than 12 minutes of commercial matter per hour on weekdays.

(b) The display of Internet Web site addresses during program material is permitted only if the Web site:

(1) Offers a substantial amount of bona fide program-related or other noncommercial content;

(2) Is not primarily intended for commercial purposes, including either e-commerce or advertising;

(3) The Web site's home page and other menu pages are clearly labeled to distinguish the noncommercial from the commercial sections; and

(4) The page of the Web site to which viewers are directed by the Web site address is not used for e-commerce, advertising, or other commercial purposes (*e.g.*, contains no links labeled ''store'' and no links to another page with commercial material).

(c) The display of Web site addresses in children's programs is prohibited during both program material and commercial material when the site uses characters from the program to sell products or services.

Note 1: *Commercial matter* means air time sold for purposes of selling a product or service and promotions of television programs or video programming services other than children's educational and informational programming.

Note 2: For purposes of this section, children's programming refers to programs originally produced and broadcast primarily for an audience of children 12 years old and younger.

* * * * *

■ 3. Section 73.671 is amended by revising paragraphs (c)(5) and (c)(6), adding paragraphs (c)(7), (d), (e), and (f), and removing Note 2 to read as follows:

§ 73.671 Educational and informational programming for children.

* * * * *

(c) * * *

(5) The program is identified as specifically designed to educate and inform children by the display on the television screen throughout the program of the symbol E/I;

(6) The educational and informational objective and the target child audience are specified in writing in the licensee's Children's Television Programming Report, as described in § 73.3526(e)(11)(iii); and

(7) Instructions for listing the program as educational/informational, including an indication of the age group for which the program is intended, are provided by the licensee to publishers of program guides, as described in § 73.673.

(d) Until analog channels are returned to the Commission, the Commission will apply the following processing guideline to analog stations in assessing whether a television broadcast licensee has complied with the Children's Television Act of 1990 (''CTA'') on its analog channel. A licensee that has aired at least three hours per week of Core Programming (as defined in paragraph (c) of this section and as averaged over a six month period) will be deemed to have satisfied its obligation to air such programming and shall have the CTA portion of its license renewal application approved by the Commission staff. A licensee will also be deemed to have satisfied this obligation and be eligible for such staff approval if the licensee demonstrates that it has aired a package of different types of educational and informational programming that, while containing somewhat less than three hours per week of Core Programming, demonstrates a level of commitment to educating and informing children that is at least equivalent to airing three hours per week of Core Programming. In this regard, specials, PSAs, short-form programs, and regularly scheduled non-weekly programs with a significant purpose of educating and informing children can count toward the three hour per week processing guideline. Licensees that do not meet these processing guidelines will be referred to the Commission, where they will have full opportunity to demonstrate compliance with the CTA (*e.g.*, by relying in part on sponsorship of Core educational/informational programs on other stations in the market that increases the amount of Core educational and informational programming on the station airing the sponsored program and/or on special nonbroadcast efforts which enhance the value of children's educational and informational television programming).

(e) The Commission will apply the following processing guideline to digital stations in assessing whether a television broadcast licensee has complied with the Children's Television Act of 1990 (''CTA'') on its digital channel(s).

(1) A digital television licensee providing only one stream of free digital video programming will be subject to the 3 hour/week Core Programming processing guideline discussed in paragraph (d) of this section on that channel; *i.e.*, a licensee that has aired at least three hours per week of Core Programming (as defined in paragraph (c) of this section and as averaged over a six month period) on its main program stream will be deemed to have satisfied its obligation to air such programming and shall have the CTA portion of its license renewal application approved by the Commission staff. A licensee will also be deemed to have satisfied this obligation and be eligible for such staff approval if the licensee demonstrates that it has aired a package of different types of educational and informational programming that, while containing somewhat less than three hours per week of Core Programming, demonstrates a level of commitment to educating and informing children that is at least equivalent to airing three hours per week of Core Programming. In this regard, specials, PSAs, short-form programs, and regularly scheduled non-weekly programs with a significant purpose of educating and informing children can count toward the three hour per week processing guideline. Licensees that do not meet these processing guidelines will be referred to the Commission, where they will have full opportunity to demonstrate compliance with the CTA (*e.g.*, by relying in part on sponsorship of Core educational/informational programs on other stations in the market that increases the amount of Core educational and informational programming on the station airing the sponsored program and/or on special nonbroadcast efforts which enhance the value of children's educational and informational television programming).

(2)(i) A digital television licensee providing streams of free digital video programming in addition to its main program stream will be subject to the processing guideline described in paragraph (e)(1) of this section on its main program stream and to the following guideline applied to the additional programming: ½ hour per week of additional Core Programming (as defined in paragraph (c) of this section and as averaged over a six month period) for every increment of 1 to 28 hours of free video programming provided in addition to the main program stream. Thus, digital broadcasters providing between 1 and 28 hours per week of free video programming in addition to their main program stream will have a guideline of ½ hour per week of core programming in addition to the 3 hours per week on the main program stream. Digital broadcasters providing between 29 and 56 hours per week of free video programming in addition to their main program stream will have a guideline of 1 hour per week of core programming in addition to the 3 hours per week on the main program stream. Digital broadcasters providing between 57 and 84 hours per week of free video programming in addition to their main program stream will have a guideline of 1½ hours per week of core programming in addition to the 3 hours per week on the main program stream. The guideline will continue to increase in this manner for additional hours of free video programming.

(ii) Broadcasters providing more than one stream of free digital video programming may air all of their additional core programming, apart from the 3 hours of core programming that must be aired on the main program stream, on one free video channel, or distribute it across multiple free video channels, at their discretion, as long as the stream on which the core programming is aired has comparable MVPD carriage as the stream whose programming generates the core programming obligation under the processing guideline described in paragraph (e)(2)(i) of this section.

(3) For purposes of the guideline described in paragraphs (e)(1) and (e)(2) of this section at least 50 percent of core programming cannot be repeated during the same week to qualify as core. This requirement does not apply to any program stream that merely time shifts the entire programming line-up of another program stream and, during the digital transition, to core programs aired on both the analog station and a digital program stream.

(f) No more than 10 percent of Core Programs may be preempted in each calendar quarter to qualify as Core Programming.

* * * * *

§ 73.673 [Amended]

■ 4. Section 73.673 is amended by removing and reserving paragraph (b).

■ 5. Section 73.3526 is amended by revising paragraph (e)(11)(iii) to read as follows:

§ 73.3526 Local public inspection file of commercial stations.

(e) * * *

(11) * * *

(iii) *Children's television programming reports.* For commercial TV broadcast stations, both analog and digital, on a quarterly basis, a completed Children's Television Programming Report (''Report''), on FCC Form 398, reflecting efforts made by the licensee during the preceding quarter, and efforts planned for the next quarter, to serve the educational and informational needs of children. The Report for each quarter is to be placed in the public inspection file by the tenth day of the succeeding calendar quarter. By this date, a copy of the Report for each quarter is also to be filed electronically with the FCC. The Report shall identify the licensee's educational and informational programming efforts, including programs aired by the station that are specifically designed to serve the educational and informational needs of children, and it shall explain how programs identified as Core Programming meet the definition set forth in § 73.671(c). The Report shall include the name of the individual at the station responsible for collecting comments on the station's compliance with the Children's Television Act, and it shall be separated from other materials in the public inspection file. The Report shall also identify the program guide publishers to which information regarding the licensee's educational and informational programming was provided as required in § 73.673, as well as the station's license renewal date. These Reports shall be retained in the public inspection file until final action has been taken on the station's next license renewal application. Licensees shall publicize in an appropriate manner the existence and location of these Reports.

* * * * *

PART 76—MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

■ 6. The authority citation for part 76 continues to read as follows:

Authority: 47 U.S.C. 151, 152, 153, 154, 301, 302, 303, 303a, 307, 308, 309, 312, 317, 325, 338, 339, 503, 521, 522, 531, 532, 533, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, and 573.

■ 7. Section 76.225 is amended by revising paragraph (b) and Note 1 and by adding paragraphs (c) and (d) to read as follows:

§ 76.225 Commercial limits in children's programs.

* * * * *

(b) The display of Internet Web site addresses during program material is permitted only if the Web site:

(1) Offers a substantial amount of bona fide program-related or other noncommercial content;

(2) Is not primarily intended for commercial purposes, including either e-commerce or advertising;

(3) The Web site's home page and other menu pages are clearly labeled to distinguish the noncommercial from the commercial sections; and

(4) The page of the Web site to which viewers are directed by the Web site address is not used for e-commerce, advertising, or other commercial purposes (*e.g.*, contains no links labeled ''store'' and no links to another page with commercial material).

(c) The display of Web site addresses in children's programs is prohibited during both program material and commercial material when the site uses characters from the program to sell products or services.

(d) This rule shall not apply to programs aired on a broadcast television channel which the cable operator passively carries, or to access channels over which the cable operator may not exercise editorial control, pursuant to 47 U.S.C. 531(e) and 532(c)(2).

Note 1 to § 76.225: Commercial matter means air time sold for purposes of selling a product or service and promotions of television programs or video programming services other than children's educational and informational programming.

* * * * *

[FR Doc. 04–28173 Filed 12–30–04; 8:45 am]

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

48 CFR Chapter 3

Acquisition Regulation

AGENCY: Department of Health and Human Services (HHS).

ACTION: Direct final rule.

SUMMARY: The Department of Health and Human Services is amending its acquisition regulation (HHSAR) for the purpose of making administrative and editorial changes to reflect organizational title changes resulting from Office of the Secretary (OS) and Operating Division (OpDiv) reorganizations; updating and removing outdated references; providing procedural guidance for reporting violations of the Procurement Integrity Act; assigning unique document numbers for contracts and task orders, in accordance with an Office of Management and Budget Memorandum dated August 6, 2003; adding a new training requirement for HHS project officers; adding the terms ''veteran-owned'' and ''service-disabled veteran-owned'' to describe small business categories consistent with the Federal Acquisition Regulation (FAR); permitting a total of basic and option periods of up to ten years for all service contracts not subject to the Service Contract Act or other statutory requirements; adding the Choice of Law (Overseas) clause in solicitations and contracts when contract performance will be outside the United States, its possessions, and Puerto Rico, except as otherwise provided in a government-to-government agreement; removing the reference to the Department's General Administration Manual with respect to major system acquisitions; deleting unconstitutional and unenforceable portions of the Confidentiality of Information clause resulting from the outcome of *Board of Trustees of Leland Stanford Junior Univ.* v. *Sullivan,* and providing current references with respect to assurances and regulations governing the protection of human subjects. HHS is issuing a direct final rule for this action because HHS expects there will be no significant adverse comments on the rule.

DATES: This direct final rule will become effective March 4, 2005, unless significant adverse comments are received by February 2, 2005. If adverse comment is received, HHS will publish a timely withdrawal of the rule in the **Federal Register**.

ADDRESSES: You may submit comments by either of the following methods: E-Mail: *Tracey.Mock@hhs.gov* or by mail to: Tracey Mock, DHHS, OS, ASAM, Office of Acquisition Management and Policy, 200 Independence Ave., SW., Room 324E, Washington, DC 20201. Please state ''48 CFR 3'' on the subject line.

FOR FURTHER INFORMATION CONTACT: Tracey Mock, Office of Acquisition Management and Policy, telephone (202) 205–4430, e-mail: *Tracey.Mock@hhs.gov.*

SUPPLEMENTARY INFORMATION:

A. Background

The Department emphasizes that it is not making significant amendments to the existing HHSAR. The amendments being made to the HHSAR concern internal procedural matters which are administrative in nature, and will not have a major effect on the general public or on contractors or offerors supporting the Department. The majority of the amendments concern HHS organizational title changes resulting from reorganizations, such as the Health Care Financing Administration (HCFA) being renamed the Centers for Medicare & Medicaid Services by the Secretary of Health and Human Services in June 2001.

B. Regulatory Flexibility Act

The Department of Health and Human Service certifies this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) because it does not impose any new requirements. Therefore, no regulatory flexibility statement has been prepared. Since this rule conveys existing acquisition policies or procedures and does not promulgate any new policies or procedures which would impact the public, it has been determined that this rule will not have a significant economic effect on a substantial number of small entities, and, thus, a regulatory flexibility analysis was not performed.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the HHSAR do not impose any record keeping or information collection requirements that require approval by the Office of Management and Budget under 44 U.S.C. 3501, *et seq.* Existing approvals cited in 48 CFR 301.106 remain in effect. The provisions of this regulation are issued under 5 U.S.C. 301; 40 U.S.C. 486 (c).

List of Subjects in 48 CFR, Parts 302, 303, 304, 306, 307, 317, 324, 333, and 352

Government procurement.

Ed Sontag,

Assistant Secretary for Administration and Management.

■ Accordingly, 48 CFR chapter 3, parts 302, 303, 304, 306, 307, 317, 324, 333, 334, and 352 are amended as follows:

■ 1. The authority citation for 48 CFR chapter 3, parts 302, 303, 304, 306, 307, 317, 324, 333, 334, and 352 continues to read as follows:

Authority: 5 U.S.C. 301; 40 U.S.C. 486(c).

CHAPTER 3—[AMENDED]

■ 2. 48 CFR chapter 3 is amended by—

■ a. Removing ''Assistant Secretary for Management and Budget'' and adding ''Assistant Secretary for Administration and Management'' in its place each time it appears;

■ b. Removing ''Administration for Children and Families'' each time it appears;

■ c. Removing ''Health Care Financing Administration'' and adding ''Centers for Medicare & Medicaid Services'' in its place each time it appears;

■ d. Removing ''Deputy Assistant Secretary for Grants and Acquisition Management'' and adding ''Director, Office of Acquisition Management and Policy'' in its place each time it appears;

■ e. Removing ''ACF'' each time it appears;

■ f. Removing ''HCFA'' and adding ''CMS'' in its place each time it appears;

■ g. Removing ''ASMB'' and adding ''ASAM'' in its place each time it appears.

■ h. Removing ''DASGAM'' and adding ''Director, OAMP'' in its place each time it appears.

■ i. Removing ''OAM'' and adding ''Division of Acquisition Policy (DAP)'' in its place each time it appears.

PART 302—DEFINITIONS OF WORDS AND TERMS

302.101 [Amended]

■ 3. Amend section 302.101 in the definition of *Head of the Contracting Agency (HCA)* by removing ''FDA—Director, Policy, Evaluation and Support Staff, Office of Facilities, Acquisition and Central Services'' and adding ''FDA—Director, Office of Acquisitions & Grant Services'' in its place.

PART 303—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

■ 4. Add section 303.104–7 to read as follows:

303.104–7 Violations or possible violations of the Procurement Integrity Act.

(a)(1) The contracting officer's determination that a reported violation or possible violation of the statutory prohibitions has no impact on the impending award or selection of a contractor must be submitted through appropriate channels, along with supporting documentation, to the Head of Contracting Activity (HCA) for review and approval of the determination awarding a contract.

(2) The contracting officer's determination that a reported violation or possible violation of the statutory prohibitions has an impact on the pending award or selection of a contractor must be referred through channels, along with all related information available, to the HCA (if the HCA is an SES) or to another SES official designated by the OpDiv. That individual will—

(i) Refer the matter immediately to the Office of Acquisition Management and Policy (OAMP), Assistant Secretary for Administration and Management, Office of the Secretary for review, which may consult with the Office of General Counsel (OGC) and the Office of Inspector General (OIG), as appropriate; and

(ii) Determine the action to be taken on the procurement in accordance with FAR 3.104–7(c) and (d). The HCA shall obtain the approval or concurrence of the OAMP before proceeding with the action.

(b) The individual in paragraph (a)(2) of this section acts as the agency head designee with respect to actions taken under the FAR clause 52.203–10, Price or Fee Adjustment for Illegal or Improper Authority.

PART 304—ADMINISTRATIVE MATTERS

■ 5. Revise paragraph (b) of Section 304.7001 to read as follows:

304.7001 Numbering acquisitions.

(a) * * *

(b) Numbering system for contracts. All contracts which require numbering (paragraphs (a)(1) through (3) of this section) shall be assigned a number consisting of the following:

(1) The three digit identification code of the Department (HHS);

(2) A one digit alphabetic identification code of the servicing agency:

O Office of the Secretary
P Program Support Center
M Centers for Medicare & Medicaid Services
F Food and Drug Administration

D Centers for Disease Control and Prevention
I Indian Health Service
S Substance Abuse and Mental Health Administration
N National Institutes of Health
H Health Resources and Services Administration
A Agency for Health Care Research & Quality

(3) The three digit numeric identification code assigned by the Office of Acquisition Management and Policy (OAMP) to the contracting office within the servicing agency;

(4) A four digit fiscal year designation (*e.g.* 2005, 2006);

(5) A five digit alphanumeric tracking number the content of which is determined by the contracting office within the servicing agency; and

(6) A one digit code describing the type of contract action:

C New Definitive Contract
P Purchase Using Simplified Acquisition
I Indefinite Delivery Contract (IDIQ)
O Basic Ordering Agreement (BOA)
B Blanket Purchase Agreement (BPA)
F Facilities Contract
U Contracts placed with or through other Government departments, GSA contracts, or against mandatory source contracts such as the National Industries for the Blind (NIB), the National Industries for the Severely Handicapped (NISH), and the Federal Prison Industries (UNICOR)
L Lease Agreement
W Government-wide Acquisition Contract (GWAC)
E Letter Contract
G Federal Supply Schedule
M Micropurchase

For example, the first contract for NIH, National Cancer Institute, for fiscal year 2005 may be numbered HHSN261200500001C.

(c) Order numbers will be assigned to contracts with orders. The order number shall be a seventeen digit number consisting of the following:

(1) The three digit identification code of the Department (HHS);

(2) A one digit numeric identification code of the servicing agency:

O Office of the Secretary
P Program Support Center
M Centers for Medicare & Medicaid Services
F Food and Drug Administration
D Centers for Disease Control and Prevention
I Indian Health Service
S Substance Abuse and Mental Health Administration
N National Institutes of Health
H Health Resources and Services Administration
A Agency for Health Care Research and Quality;

(3) The three digit numeric identification code assigned by the Office of Acquisition Management and Policy (OAMP) to the contracting office within the servicing agency;

(4) A ten digit alphanumeric tracking number the content of which is determined by the contracting office within the servicing agency.

PART 306—COMPETITION REQUIREMENTS

306.501 [Amended]

■ 6.–8. Amend section 306.501 by:
■ a. Removing ''FDA—Director, Office of Facilities, Acquisition, and Central Services'' and adding ''FDA—Chief, Office of Shared Services'' in its place;
■ b. By removing ''HCFA—Director, Office of Internal Customer Support'' and adding ''CMS—Chief Operating Officer—in its place;
■ c. By removing ''NIH—(R&D) Director, Office of Extramural Research (Other than R&D)—Director, Office of Intramural Research'' and adding ''NIH—Senior Advisor for Policy, Office of Extramural Research (R&D) and Senior Advisor to the Deputy Director for Intramural Research (Other than R&D)'' in its place.

PART 307—ACQUISITION PLANNING

■ 9. Redesignate paragraph (a)(3) as (a)(4) and add new paragraph (a)(3) to section 307.170–2 to read as follows:

307.170–2 Training course prerequisites.

(a) * * *

(3) Project Officers on HHS projects for which HHS or OMB requires an Exhibit 300 [under OMB Circular A–11, part 7] must successfully complete either HHS'' ''Early Warning Project Management System Workshop'' or an equivalent Earned Value Management course (see paragraph 307.170(c)).

* * * * *

307.7105 [Amended]

■ 10.–11. In section 307.7105, revise the last sentence of paragraph (a)(6) to read as follows:

307.7105 Format and content.

* * * * *

(a) * * *

(6) * * * Efforts to identify set-aside possibilities, *e.g.*, 8(a), HUBZone, veteran-owned, service-disabled veteran-owned, and small business, and efforts to identify sources such as small disadvantaged and women-owned small businesses must be documented.

* * * * *

PART 317—SPECIAL CONTRACTING METHODS

■ 12. Add new section 317.204 to read as follows:

317.204 Contracts.

(e) The total of the basic and option periods shall not exceed 10 years in the case of services and the total of the basic and option quantities shall not exceed the requirement for 5 years in the case of supplies. These limitations do not apply to information technology contracts. However, statutes applicable to various classes of contracts, such as the Service Contract Act, may place additional restrictions on the length of contracts.

PART 324—PROTECTION OF PRIVACY AND FREEDOM OF INFORMATION

■ 13. Redesignate section 324.100 as 324.000 and revise to read as follows:

324.000 Scope of subpart.

This part prescribes policies and procedures that apply requirements of the Privacy Act of 1974 (5 U.S.C. 552a) (the Act) and OMB Circular A–130, Revised, November 30, 2000, to Government contracts and cites the Freedom of Information Act (5 U.S.C. 552, as amended).

PART 333—PROTESTS, DISPUTES, AND APPEALS

■ 14.–15. Add new section 333.215–70 to read as follows:

333.215–70 Additional contract clause.

Use the clause at 352.333–7001, Choice of Law (Overseas), in solicitations and contracts when contract performance will be outside the United States, its possessions, and Puerto Rico, except as otherwise provided for in a government-to-government agreement.

PART 334—MAJOR SYSTEM ACQUISITION

■ 16. Amend section 334.003 by removing ''The Department's implementation of OMB Circular No. A–109 may be found in chapter 1–150 of the General Administration Manual'' and adding ''The Department's implementation of major system acquisitions should be conducted in accordance with OMB Circular A–109, Major System Acquisitions'' in its place.

PART 352—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

Subpart 352.2—Texts of Provisions and Clauses

352.224–70 [Amended]

■ 17. In section 352.224–70, remove paragraphs (b) and (f) and redesignate paragraph (c) as (b), paragraph (d) as (c), paragraph (e) as (d), paragraph (g) as (e), paragraph (h) as (f), and paragraph (i) as (g).

352.270–8 [Amended]

■ 18.–20. Amend section 352.270–8 in paragraph (a) by removing ''Office for Protection from Research Risks (OPRR), National Institutes of Health,'' and adding ''Office for Human Research Protections (OHRP)'' in its place; amend the last sentence of paragraph (d) in section 352.270–8 by removing ''National Institutes of Health'' and replacing with ''OpDiv''; and remove the last sentence of paragraph (e) in section 352.270–8 and add ''The contracting officer will direct the offeror/contractor to the OHRP IRB Registration and Assurance Filing website, found at *http://www.hhs.gov/ohrp/* or to the physical address if the offeror/contractor cannot access the Internet. HHS regulations for the protection of human subjects may be found at: *http://www.access.gpo.gov/nara/cfr/waisidx_01/45cfr46_01.html''* in its place.

352.270–9 [Amended]

■ 21.–22. Amend section 352.270–9 by removing the heading in paragraph (a) reading ''Notice to Offerors of Requirement for Adequate Assurance of Protection of Vertebrate Animal Subjects (Sep. 1985)'' and adding ''Notice to Offerors of Requirement for Compliance with the Public Health Service Policy on Humane Care and Use of Laboratory Animals (Revised 1986, Reprinted 2000)'' in its place; and amend section 352.270–9 by removing in the undesignated paragraph under the heading ''Office for Protection from Research Risks (OPRR),'' and adding ''Office of Laboratory Animal Welfare (OLAW)'' in its place.

■ 23. Add new section 352.333–7001, to read as follows:

352.333–7001 Choice of Law (Overseas).

As prescribed in 333.215–70, use the following clause:

Choice of Law (Overseas)

This contract shall be construed and interpreted in accordance with the substantive laws of the United States of America. By the execution of this contract, the contractor expressly agrees to waive any rights to invoke the jurisdiction of local national courts where this contract is performed and agrees to accept the exclusive jurisdiction of the United States Armed Services Board of Contract Appeals and the United States Court of Federal Claims for hearing and determination of any and all disputes that may arise under the Disputes clause of this contract.

[FR Doc. 04–27697 Filed 12–30–04; 8:45 am]

BILLING CODE 4151–17–P

DEPARTMENT OF AGRICULTURE

Office of Procurement and Property Management

48 CFR Parts 401, 403, 404, 405, 406, 407, 408, 410, 411, 413, 414, 415, 416, 419, 422, 423, 424, 425, 426, 428, 432, 433, 434, 436, 439, 445, 450, 452, and 453

RIN 0599–AA11

Agriculture Acquisition Regulation: Miscellaneous Amendments (AGAR Case 2004–01)

AGENCY: Office of Procurement and Property Management, USDA.

ACTION: Direct final rule.

SUMMARY: The Department of Agriculture (USDA) is publishing technical amendments to the Agriculture Acquisition Regulation (AGAR) as a final rule. We use the direct final rule process to make non-controversial changes to the AGAR. We are amending the AGAR to update organizational references to USDA components; to update citations to statutes and to Executive Orders; to update or clarify internal procedures; and to reflect changes in the Federal Acquisition Regulation through Federal Acquisition Circular 2001–24.

DATES: This rule will be effective on April 4, 2005, unless we receive written adverse comments or written notice of intent to submit adverse comments on or before February 2, 2005. If adverse comments are received, USDA will publish a timely withdrawal of the rule in the **Federal Register**.

ADDRESSES: Please submit any adverse comments, or a notice of intent to submit adverse comments, identified by AGAR Case 2004–01 or Regulatory Information Number (RIN) 0599–AA11, by any of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.
- E-mail: *joe.daragan@usda.gov.* Include AGAR Case 2004–01 or RIN 0599–AA11 in the subject line of the message.
- Fax: (202) 720–8972.
- Mail: U.S. Department of Agriculture, Office of Procurement and Property Management, Procurement Policy Division, STOP 9303, 1400 Independence Avenue, SW., Washington, DC 20250–9303.
- Hand Delivery/Courier: U.S. Department of Agriculture, Office of Procurement and Property Management, Procurement Policy Division, Reporter's Building, 300 7th Street, SW., Room 310A, Washington, DC 20024.

All submissions received must include the agency name and AGAR Case number or RIN for this rulemaking. All comments received will be posted without change to *http://www.usda.gov/procurement/policy/agar.html,* including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Joseph J. Daragan, (202) 720–5729.

SUPPLEMENTARY INFORMATION:

I. Background

The AGAR implements the Federal Acquisition Regulation (FAR) (48 CFR ch. 1) where further implementation is needed, and supplements the FAR when coverage is needed for subject matter not covered by the FAR. The AGAR is being revised to reflect changes in the FAR made by Federal Acquisition Circulars (FACs) 97–02 through 2001–24 and to implement changes in USDA delegated authorities and internal procedures since October 2001. In this rulemaking document, USDA is making corrections to the AGAR as a direct final rule, since the corrections are non-controversial and unlikely to generate adverse comment. The corrections are clerical or procedural in nature and do not affect the public.

Rules that an agency believes are noncontroversial and unlikely to result in adverse comments may be published in the **Federal Register** as direct final rules. The Office of Procurement and Property Management published a policy statement in the **Federal Register** (63 FR 9158, February 24, 1998) notifying the public of its intent to use direct final rulemaking in appropriate circumstances.

This rule makes the following changes to the AGAR:

(a) Added parts. We are adding parts 410 and 439 to the AGAR. Part 410 is added to establish procedures for market research. Part 439 is added to incorporate supplementary guidance on USDA internal procedures for acquisition of information technology.

(b) Added subparts. We have added the following subparts to the AGAR:

(1) Subpart 404.2 is added to refer to internal procedures for entering Taxpayer Identification Number information into USDA's financial system.

(2) Subpart 404.11 is added to supplement FAR 4.11, Central Contractor Registration, by clarifying the contracting officer's role in the registration process.

(3) Subpart 425.6 is added to incorporate newly redesignated 425.602 (redesignated from 425.1002).

(c) Revised part. Part 423 is revised to reflect amendments to the FAR, to establish agency procedures to implement FAR Part 23 as amended, to remove directions concerning a superseded recycling and waste prevention program, and to provide internal guidance concerning its successor affirmative procurement program.

(d) Removed subparts. We have removed and reserved the following subparts:

(1) Subpart 407.3 is removed and reserved pending revision to FAR subpart 7.3 and Departmental directives to conform to the procedures and policy of Office of Management and Budget Circular A–76 dated May 21, 2004.

(2) Subpart 425.3 is removed and reserved to reflect an amendment to the FAR.

(3) Subpart 425.4 is removed and reserved because it is no longer necessary to publicize redeterminations of the Trade Agreement Act dollar thresholds as a Departmental Notice. The information is readily available on the USDA procurement Web site.

(4) Subpart 426.70 is removed and reserved because legislation establishing the program it implemented was repealed by Public Law 107–171, section 6201(a). AGAR provisions 452.226–70 through 452.226–72 are removed and reserved for the same reason.

(5) Subpart 445.6 is removed and reserved. This subpart implemented a property-screening requirement that was removed from the FAR.

(6) Subpart 450.1 is removed and reserved to reflect an amendment to the FAR.

(e) Redesignated sections. We have moved the following sections as follows to reflect amendments to the structure of the FAR:

(1) Paragraph (a) of 403.104–10 is redesignated 403.104–7, and paragraph (b) of 403.104–10 is removed.

(2) Section 403.409 is redesignated 403.405, and the citation therein to the corresponding FAR segment is updated.

(3) Section 411.105 is redesignated 411.106.

(4) Section 432.905 is redesignated 432.904, and its heading is amended.

(5) Section 432.906 is redesignated 432.007.

(f) Amendments to organizational references. The following amendments reflect changes in organizational designations or delegations of authority:

(1) In 401.301, ''Food and Consumer Service'' and ''Office of Operations'' are amended to read ''Food and Nutrition Service'', and ''Departmental Administration'', respectively.

(2) Sections 404.403, 405.404–1, and 414.409–2 are amended to reflect the delegation of authority over classified information to the Personnel and Document Security Division, Office of Procurement and Property Management.

(3) Subpart 408.7 is amended to reflect organizational changes and a change in organizational title within USDA's Javits-Wagner-O'Day (JWOD) program.

(4) Part 434 is amended to reflect the delegation of authority over information technology acquisition to the Chief Information Officer.

(g) Paragraph (b) of 401.105–1 is revised to inform users that the AGAR is no longer available in loose-leaf form. An electronic version of the AGAR is available at USDA's Procurement Homepage for downloading and reproduction.

(h) Paragraph (c) of 401.105–1 is revised to reflect the cancellation of Office of Federal Procurement Policy Policy Letter 83–2. Citations to the ''Hardin Statement of Policy'' (36 FR 13804, July 24, 1971), to the Office of Federal Procurement Policy Act, 41 U.S.C. 418b, and to FAR 1.301 are added to refer to other policy and law governing amendments to the AGAR.

(i) Section 401.170 is revised to update the Internet address for the USDA Procurement Homepage.

(j) Section 401.201–1 is amended to improve clarity.

(k) Section 401.371 is amended to specify that AGAR Advisories are only available in electronic format.

(l) Section 403.502 is amended to correct a citation to the Anti-Kickback Act (41 U.S.C. 51–58).

(m) Subpart 404.6 is amended to remove references to the USDA Procurement Reporting System (PRS). PRS was a feeder system that has been replaced by the Federal Procurement Data System-Next Generation (FPDS–NG). Subpart 404.6 also is amended to implement changes in reporting required by FAR 4.602, Federal Procurement Data System.

(n) Section 404.870 is revised, and 404.870–1 and 404.870–2 are removed. Guidance on document numbering will be provided by AGAR Advisories until USDA's Integrated Acquisition System is fully implemented.

(o) Section 405.403 is amended to reflect an amendment to the FAR.

(p) Section 406.501 is revised to reflect a change in organizational title and to add an internal notification requirement.

(q) Section 407.170 is amended to remove reference to a cancelled Departmental Directive.

(r) Section 408.705 is amended as an editorial change, adopting the phrase ''performance plan'' in preference to the phrase ''action plan''.

(s) Section 408.1103 is amended to add references to alternative fuels and tires with recovered material content.

(t) Section 411.101 is added to specify the level at which a determination that a voluntary standard is inconsistent with law or otherwise impracticable may be made.

(u) Sections 413.307 and 453.213 are amended to allow the use of Optional Forms 347 and 348 when a simplified acquisition utilizes the USDA Integrated Acquisition System.

(v) Paragraph (d) of 415.207 is amended to update a citation to FAR 3.104–4.

(w) Section 416.505 is amended to update an organizational title and to require Heads of Contracting Activities to designate task order ombudsmen for their contracting activities.

(x) Subpart 419.2 is revised to include HubZone and veteran-owned small business concerns, to require small business coordinators to review large contract requirements for bundling, and to remove fixed due dates for subcontract reports, because these dates may vary.

(y) The heading of 419.508 is amended to reflect an amendment to the FAR.

(z) The heading of subpart 419.6 is amended to reflect an amendment to the FAR.

(aa) Section 422.604–2 is amended to update a citation to FAR 22.604–2(b).

(ab) Paragraph (b) of 422.807 is amended to reflect an amendment to FAR 22.807.

(ac) Subpart 422.13 is revised as follows:

(1) The heading of subpart 422.13 is amended to reflect an amendment to the FAR.

(2) Section 422.1303 is redesignated 422.1305 and revised to reflect an amendment to the FAR.

(3) Section 422.1306 is redesignated 422.1308, and the corresponding citation to the FAR amended, to reflect an amendment to the FAR.

(ad) The heading of subpart 422.14 is amended to reflect an amendment to the FAR.

(ae) Section 422.1403 is amended to reflect an amendment to the FAR.

(af) Section 424.203 is amended to remove unnecessary language.

(ag) Subpart 425.1 is revised to reflect amendments to the FAR.

(ah) The heading of 425.202 is amended, and the citation therein to the FAR is amended, to reflect an amendment to the FAR.

(ai) Subpart 425.6 is added to incorporate material currently in subpart 425.10, in order to reflect an amendment to the FAR. Section 425.1002 is redesignated 425.602, its heading is amended, and the citation therein to the FAR is amended.

(aj) Subpart 425.9 is redesignated 425.10, and its heading is amended, to reflect an amendment to the FAR.

(ak) Section 425.901 is redesignated 425.1001, and the citation therein to the FAR is amended, to reflect an amendment to the FAR. Subpart 425.9 is removed and reserved.

(al) The heading of subpart 428.1 is amended to reflect an amendment to the FAR.

(am) The heading of subpart 428.2 is amended to reflect an amendment to the FAR.

(an) Section 432.905 is redesignated 432.904, and its heading is amended, to reflect an amendment to the FAR.

(ao) Section 432.906 is moved to 432.007 to reflect an amendment to the FAR.

(ap) Section 433.104 is removed and reserved to simplify

USDA's internal protest procedures.

(aq) Section 452.211–70 is amended to correct an error in citation to 452.211–71.

(ar) Section 452.232–70 is amended to correct a typographical error.

(as) Section 452.236–78 is removed and reserved. This section referred to standard specifications that are now obsolete.

II. Procedural Requirements

A. Executive Orders Nos. 12866 and 12988

USDA prepared a work plan for this regulation and submitted it to the Office of Management and Budget (OMB) pursuant to Executive Order No. 12866. OMB determined that the rule was not significant for the purposes of Executive Order No. 12866. Therefore, the rule has not been reviewed by OMB. USDA has reviewed this rule in accordance with Executive Order No. 12988, Civil Justice Reform. The rule meets the applicable standards in section 3 of Executive Order No. 12988.

B. Regulatory Flexibility Act

USDA reviewed this rule under the Regulatory Flexibility Act, 5 U.S.C. 601–611, which requires preparation of a regulatory flexibility analysis for any rule which is likely to have significant economic impact on a substantial number of small entities. USDA certifies that this rule will not have a significant economic effect on a substantial number of small entities, and, therefore, no regulatory flexibility analysis has been prepared. However, comments from small entities concerning parts affected by the proposed rule will be considered. Such comments must be submitted separately and cite 5 U.S.C. 609 (AGAR Case 2004–01) in correspondence.

C. Paperwork Reduction Act

No information collection or recordkeeping requirements are imposed on the public by this rule. Accordingly no OMB clearance is required by the Paperwork Reduction Act, 44 U.S.C. Chapter 35, or OMB implementing regulations at 5 CFR part 1320.

D. Small Business Regulatory Enforcement Fairness Act

A report on this rule has been submitted to each House of Congress and the Comptroller General in accordance with the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 801–808. This rule is not a major rule for purposes of the Act.

E. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. USDA has determined that this rule does not contain a Federal mandate. USDA has also determined that this rule would not significantly or uniquely affect small governments. Accordingly, the rule is not subject to the requirements of Title II of UMRA.

F. Executive Order 13132: Federalism

Executive Order 13132, Federalism (64 FR 43255, August 10, 1999), imposes requirements in the development of regulatory policies that have federalism implications. ''Policies that have federalism implications'' are defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

USDA has determined that this rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. The rule will not impose substantial costs on States and localities. Accordingly, this rule is not subject to the procedural requirements of Executive Order 13132 for regulatory policies having federalism implications.

G. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, Consultation and Coordination with Indian Tribal Governments (65 FR 67249, November 9, 2000), imposes requirements in the development of regulatory policies that have tribal implications. Executive Order 13175 defines ''policies that have tribal implications'' as those having ''substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.'' USDA has determined that this rule does not have tribal implications and, therefore, the consultation and coordination requirements of Executive Order 13175 do not apply to this rule.

List of Subjects in 48 CFR Parts 401, 403, 404, 405, 406, 407, 408, 410, 411, 413, 414, 415, 416, 419, 422, 423, 424, 425, 426, 428, 432, 433, 434, 436, 439, 445, 450, 452, and 453

Acquisition regulations, Government contracts, Government procurement, Procurement.

■ For the reasons set out in the preamble, 48 CFR Chapter 4 is amended as set forth below:

■ 1. The authority citation for parts 401, 403, 404, 405, 406, 407, 408, 411, 413, 414, 415, 416, 419, 422, 424, 425, 426, 428, 432, 433, 436, 445, 450, 452, and 453 continues to read as follows:

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

PART 401—AGRICULTURE ACQUISITION REGULATION SYSTEM

■ 2. Revise paragraphs (b) and (c) of 401.105–1 to read as follows:

401.105–1 Publication and code arrangement.

* * * * *

(b) The AGAR and its subsequent changes are published in:

(1) Daily issues of the **Federal Register**,

(2) Cumulative form in the CFR, and,

(3) Electronic form on the USDA Departmental Administration Procurement Homepage (see 401.170).

(c) Section 553(a)(2) of the Administrative Procedure Act, 5 U.S.C. 553, provides an exception from the standard public rulemaking procedures to the extent that the rule involves a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts. In 1971, Secretary of Agriculture Hardin announced a voluntary partial waiver from the Administrative Procedure Act exception, and USDA agencies generally are required to provide notice and an opportunity for public comment on proposed rules (36 FR 13804, July 24, 1971). The AGAR has been promulgated and may be revised from time to time in accordance with the rulemaking procedures of the Administrative Procedure Act. The USDA also is required to publish for public comment procurement regulations in the **Federal Register,** pursuant to the Office of Federal Procurement Policy Act (41 U.S.C. 418b), and FAR 1.301.

■ 3. Amend 401.170 to remove ''URL *http://www.usda.gov/da/procure.html*'' and add, in its place, ''URL *http://www.usda.gov/procurement/*''.

■ 4. Revise paragraph (b) of 401.201–1 to read as follows:

401.201–1 The two councils.

* * * * *

(b) The Procurement Policy Division will coordinate proposed FAR revisions within USDA.

■ 5. Amend 401.301 as follows:

■ a. Remove ''Food and Consumer Service'' and add, in its place, ''Food and Nutrition Service''.

■ b. Remove ''Office of Operations'' and add, in its place, ''Departmental Administration''.

■ 6. Add paragraph (d) to 401.371, to read as follows:

401.371 AGAR Advisories.

* * * * *

(d) AGAR Advisories are only available in electronic format on the USDA Procurement Web site at *http://www.usda.gov/procurement/.*

PART 403—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

■ 7. Remove ''(a)'' and paragraph (b) in 403.104–10, and redesignate 403.104–10 as 403.104–7.

■ 8. Amend 403.409 to remove ''FAR 3.409(b)'', and add, in its place, ''FAR 3.405(b)'', and redesignate 403.409 as 403.405.

■ 9. Amend 403.502 to remove ''(41 U.S.C. 51–54)'', and add, in its place, ''(41 U.S.C. 51–58)''.

PART 404—ADMINISTRATIVE MATTERS

■ 10. Revise the table of contents to read as follows:

Subpart 404.2—Contract Distribution

Sec.
404.203 Taxpayer identification information.

Subpart 404.4—Safeguarding Classified Information Within Industry

404.403 Responsibilities of contracting officers.

Subpart 404.6—Government Contract Reporting

404.601 [Reserved]
404.602 Federal Procurement Data System.

Subpart 404.8—Government Contract Files

404.870 Document numbering system.

Subpart 404.11—Central Contractor Registration

404.1103 Procedures.

Subpart 404.70—Precontract Notices

404.7001 Solicitation provision.

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

■ 11. Add subpart 404.2 to read as follows:

Subpart 404.2—Contract Distribution

404.203 Taxpayer identification information.

(a) If the contractor furnishes taxpayer identification number (TIN) and type of organization information pursuant to solicitation provision 52.204–3 or 52.212–3, and the USDA Office of the Chief Financial Officer, Controller Operations Division, New Orleans will be the payment office, that information will be entered into the Foundation Financial Information System (FFIS) in accordance with FFIS Vendor Table Maintenance Procedures set forth in FFIS Bulletins issued by the Office of the Chief Financial Officer and AGAR Advisories issued by the Office of Procurement and Property Management.

(b) Separate submission of the TIN or type of organization information, in accordance with 52.204–3 or 52.212–3, is not required for contractors registered in the Central Contractor Registration (CCR) database.

■ 12. Revise 404.403 to read as follows:

404.403 Responsibilities of contracting officers.

When a proposed solicitation is likely to require access to classified information, the contracting officer shall consult with the Information Security Staff, Personnel and Document Security Division, Office of Procurement and Property Management, regarding the procedures that must be followed.

404.601 [Removed and Reserved]

■ 13. Remove and reserve 404.601.

■ 14. Revise 404.602 to read as follows:

404.602 Federal Procurement Data System.

(a) Contracting activities shall report contract actions into the Federal Procurement Data System in accordance with the instructions issued or distributed by the SPE.

(b) The unique identifier for each contract action reported to the Federal Procurement Data System shall begin with the two-letter USDA Agency Prefix ''AG''.

■ 15. Revise subpart 404.8 to read as follows:

Subpart 404.8—Government Contract Files

404.870 Document numbering system.

The SPE shall issue AGAR Advisories to establish and maintain a numbering system for USDA contracts, modifications, and delivery/task orders. USDA contracting offices shall number contracts, modifications, and orders in accordance with this numbering system.

■ 16. Add subpart 404.11 to read as follows:

Subpart 404.11—Central Contractor Registration

404.1103 Procedures.

(a) Contracting officers and other USDA employees shall not enter information into the Central Contractor Registration (CCR) database on behalf of prospective contractors. Prospective contractors who are unable to register on-line at the CCR Web site should be advised to submit a written application to CCR for registration into the CCR database. USDA employees may assist prospective contractors by downloading

the registration template, CCR handbook, and other information from the CCR Web site and providing copies of that material to requesters. Written applications for registration may be submitted to Department of Defense Central Contractor Registration, 74 Washington Ave., Suite 7, Battle Creek, MI 49017–3084.

(b) Verification that the prospective contractor is registered in the CCR database shall be done via the CCR Internet Web site *http://www.ccr.gov.* This verification process using the CCR Web site applies both to acquisitions executed using USDA legacy procurement systems and the USDA Integrated Acquisition System.

(c) AGAR Advisories issued by the Office of Procurement and Property Management will address internal procedures for integration of contractor information in the CCR database with the USDA FFIS payment system.

PART 405—PUBLICIZING CONTRACT ACTIONS

405.403 [Amended]

■ 17. Amend 405.403 to remove ''FAR 5.403(a)'' and add, in its place, ''FAR 5.403''.

■ 18. Revise paragraph (b) of 405.404–1 to read as follows:

405.404–1 Release procedures.

* * * * *

(b) Classified information shall not be released without the approval of the Information Security Staff, Personnel and Document Security Division, Office of Procurement and Property Management. Departmental Manuals and Regulations (3400 series) contain guidance on classified information.

PART 406—COMPETITION REQUIREMENTS

■ 19. Revise 406.501 to read as follows:

406.501 Requirements.

(a) The Chief, Procurement Policy Division, Office of Procurement and Property Management, has been designated as the Competition Advocate for USDA.

(b) Each HCA shall designate a competition advocate for the contracting activity. The HCA shall forward a copy of the designation memorandum to the Competition Advocate for USDA.

PART 407—ACQUISITION PLANNING

■ 20. Revise 407.170 to read as follows:

407.170 Advance acquisition plans.

Each HCA shall maintain an advance acquisition planning system.

Subpart 407.3—[Removed and Reserved]

■ 21. Remove and reserve subpart 407.3.

PART 408—REQUIRED SOURCES OF SUPPLIES AND SERVICES

Subpart 408.7—Amended

■ 22. Amend subpart 408.7 to remove the word ''Advocate'' wherever it appears and add, in its place, the word ''Liaison.''

■ 23. Revise 408.701 to read as follows:

408.701 Definitions.

Committee Member is the Presidential appointee representing USDA as a member of the Committee for Purchase from People Who Are Blind or Severely Disabled.

Organization head is the Under Secretary or Assistant Secretary of a mission area or the head of a USDA staff office.

408.705 [Amended]

■ 24. Amend 408.705 to remove the word ''action'' and add, in its place, the word ''performance.''

■ 25. Revise 408.1103 to read as follows:

408.1103 Contract requirements.

If the requirement includes the need for the vendor to provide operational maintenance such as fueling, lubrication, or other fluid changes or replenishment, the contracting officer shall include in the contract:

(1) A requirement for the use of fluids and lubricants containing the maximum available amounts of recovered materials, and alternative fuels whenever available; and

(2) A preference for retreaded tires meeting the Federal retread specifications, tires with the maximum recovered material content, or retreading services for the tires on the vehicle.

PART 410—MARKET RESEARCH

■ 26. Add new Part 410, to read as follows:

Sec.
410.001 Policy.
410.002 Procedures.

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c)

410.001 Policy.

In addition to those uses listed in FAR 10.001, agencies must use the results of market research to—

(a) Ensure the minimum use of hazardous or toxic materials;

(b) Ensure the maximum use of biobased products and biofuels; and

(c) Identify products and services on or eligible for addition to the Javits-Wagner-O'Day Act Procurement List in order to achieve USDA's goal to increase participation in this program.

410.002 Procedures.

Market research must include obtaining information on the commercial quality assurance practices as an alternative for Government inspection and testing prior to tender for acceptance.

PART 411—DESCRIBING AGENCY NEEDS

■ 27. Add new 411.101, as follows:

411.101 Order of precedence for requirements documents.

(a) Office of Management and Budget (OMB) Circular A–119 establishes a Federal policy requiring the use of voluntary consensus standards in lieu of government-unique standards except where inconsistent with law or otherwise impractical.

(b) The HCA is authorized to submit the determination required by OMB Circular A–119 that a voluntary standard is inconsistent with law or otherwise impracticable. The HCA must submit the determination to OMB through the National Institute of Standards and Technology in accordance with the Circular with a copy provided to the SPE.

■ 28. Redesignate 411.105 as 411.106.

PART 413—SIMPLIFIED ACQUISITION PROCEDURES

■ 29. Revise 413.307 to read as follows:

413.307 Forms.

Form AD–838, Purchase Order, is prescribed for use by USDA in lieu of Optional Forms (OFs) 347 and 348 except that use of the OF 347 and OF 348 is authorized when utilizing the USDA Integrated Acquisition System.

PART 414—SEALED BIDDING

■ 30. Revise 414.409–2 to read as follows:

414.409–2 Award of classified contracts.

Disposition of classified information shall be in accordance with Departmental Regulation and Manual (3400 Series) and in accordance with direction issued by the Information Security Staff, Personnel and Document Security Division, Office of Procurement and Property Management.

PART 415—CONTRACTING BY NEGOTIATION

415.207 [Amended]

■ 31. In paragraph (d) of 415.207, remove ''FAR 3.104–5'', and add, in its place, ''FAR 3.104–4''.

PART 416—TYPES OF CONTRACTS

■ 32. Revise paragraphs (a) and (b) of 416.505 to read as follows:

416.505 Ordering.

(a) The Chief, Procurement Policy Division, Office of Procurement and Property Management, has been designated as the Departmental Task Order Ombudsman.

(b) Each HCA shall designate a task order ombudsman for the contracting activity. The HCA shall forward a copy of the designation memorandum to the Departmental Task Order Ombudsman. Contracting activity ombudsmen shall review and resolve complaints from contractors concerning task or delivery orders placed by the contracting activity.

* * * * *

PART 419—SMALL BUSINESS PROGRAMS

■ 33.–35. Revise subpart 419.2 to read as follows:

Subpart 419.2—Policies

Sec.

419.201 General policy.

It is the policy of USDA to provide maximum practicable contracting and subcontracting opportunities to small business (SB), small disadvantaged business (SDB), HUBZone small business, women-owned business (WOB), veteran-owned small business (VOSB), and service-disabled veteran-owned small business (SDVOSB) concerns.

419.201–70 Office of Small and Disadvantaged Business Utilization (OSDBU).

The Office of Small and Disadvantaged Business Utilization (OSDBU) develops rules, policy, procedures and guidelines for the effective administration of USDA's small business program that includes all categories named under 419.201.

419.201–71 Small business coordinators.

The head of the contracting activity (HCA) or a representative of the HCA shall designate in writing a small business coordinator in each contracting office. Supervisors of small business coordinators are encouraged to provide sufficient time for the coordinators to carry out their small business program duties. Coordinators' duties shall include, but not be limited to, the following:

(a) Reviewing each proposed acquisition expected to exceed the simplified acquisition threshold prior to its solicitation. The coordinator shall:

(1) Recommend section 8(a), HUBZone, or SDVOSB action and identify potential contractors, or

(2) Identify available SDB, WOB, and VOSB to be solicited by competitive procedures. Coordinators shall document the contract file with recommendations made and actions taken.

(b) Participating in goal-setting procedures and planning activities and establishing aggressive SDB, WOB, and SDVOSB goals based on the annual review of advance acquisition plans.

(c) Participating in the review of those contracts which require the successful offeror to submit written plans for the utilization of small businesses as subcontractors to include all preference program areas in 419.201.

(d) Ensuring that purchases exceeding $2,500 and not exceeding the simplified acquisition threshold are reserved exclusively for small businesses, including all preference program areas named in 419.201. This policy shall be implemented unless the contracting officer is unable to obtain offers from two or more small business concerns that are competitive with market prices and in terms of quality and delivery of the goods or services being purchased.

(e) Maintaining comprehensive source listings of small businesses.

(f) Upon written request, providing small businesses (in the preference program areas named in 419.201) the bidders' mailing lists of individuals receiving solicitations which will contain the subcontracting clause entitled ''Utilization of Small Business Concerns'' (FAR 52.219–8). These lists may be limited to those supplies or services of major interest to the requesting firms.

(g) Developing a program of contacts with local and small (to include all preference program areas named in 419.201) trade, business, and professional associations and organizations and Indian tribal councils to apprise them of USDA's program needs and recurring contract requirements.

(h) Periodically meeting with program managers to discuss requirements of the small business preference program, to explore the feasibility of breaking large complex requirements into smaller lots suitable for participation by small firms, and to encourage program managers to meet with these firms so that their capabilities can be demonstrated.

(i) Establishing internal operating procedures which implement the requirements of the regulations as set forth in this part 419.

(j) Compiling data and preparing all reports pertaining to the small business program activities, and ensuring that these reports are accurate, complete and up-to-date.

(k) Assisting and counseling small business firms.

(l) Reviewing proposed large contract requirements that may be bundled to determine the potential for breaking out components suitable for purchase from small business firms.

(m) Ensuring that the SBA Resident Procurement Center Representative (PCR) is provided an opportunity and reasonable time to review any solicitation that meets the dollar threshold for small business (including all preference program areas named in 419.201) subcontracting plans.

419.201–73 Reports.

The Director, OSDBU, shall be responsible for submitting reports concerning USDA's progress and achievements in the procurement preference program.

■ 36. Amend the heading of 419.508 to remove ''Solicitation provisions'' and add, in its place, ''Solicitation provisions and contract clauses''.

■ 37. Amend the heading of subpart 419.6 to remove ''Determinations of Eligibility'' and add, in its place, ''Determinations of Responsibility''.

PART 422—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

422.604–2 [Amended]

■ 38.–39. Amend 422.604–2 as follows:

■ a. Remove ''FAR 22.604–2(c)'' and add, in its place, ''FAR 22.604–2(b)''.

■ b. Remove ''Secretary of labor'' and add, in its place, ''Secretary of Labor''.

■ 40. Amend 422.807 to remove ''Director, Office of Federal Contract Compliance Programs'', and add, in its place, ''Deputy Assistant Secretary for Federal Contract Compliance Programs, Department of Labor''.

■ 41. Revise subpart 422.13 to read as follows:

Subpart 422.13—Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible Veterans

Sec.
422.1305 Waivers.
422.1308 Complaint procedures.

422.1305 Waivers.

(a) The Assistant Secretary for Administration is authorized to make the waiver determination in FAR 22.1305(b) that a contract is essential to the national security.

(b) The contracting officer shall submit requests for exemptions under FAR 22.1305(a) and (b) through the HCA to the SPE for determination by the Assistant Secretary for Administration or referral to the Deputy Assistant Secretary for Federal Contract Compliance Programs, Department of Labor as appropriate.

422.1308 Complaint procedures.

The contracting officer shall forward complaints received about the administration of the Vietnam Era Veterans Readjustment Assistance Act directly to the Department of Labor as prescribed in FAR 22.1308.

■ 42. Amend the heading of subpart 422.14 to remove the words ''the Handicapped'' and add, in their place, ''Workers With Disabilities''.

■ 43. Amend paragraph (a) of 422.1403 to remove the words ''concurrence of the Director, OFCCP'' and add, in their place, the words ''the concurrence of the Deputy Assistant Secretary for Federal Contract Compliance Programs, Department of Labor''.

PART 423—ENVIRONMENT, ENERGY AND WATER EFFICIENCY, RENEWABLE ENERGY TECHNOLOGIES, OCCUPATIONAL SAFETY, AND DRUG-FREE WORKPLACE

■ 44. Revise Part 423 to read as follows:

Subpart 423.1—[Reserved]

Subpart 423.2—Energy and Water Efficiency and Renewable Energy

Sec.
423.202 Policy.

Subpart 423.4—Use of Recovered Materials

423.400 Scope of subpart.
423.402 [Reserved]
423.403 Policy.
423.404 Agency affirmative procurement programs.
423.405 Procedures.

Subpart 423.5—Drug-Free Workplace

423.506 Suspension of payments, termination of contract, and debarment and suspension actions.

Subpart 423.6—Notice of Radioactive Material

423.601 Requirements.

Subpart 423.7—Contracting for Environmentally Preferable Products and Services

423.703 Policy.

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

Subpart 423.1—[Reserved]

Subpart 423.2—Energy and Water Efficiency and Renewable Energy

423.202 Policy.

Information on Energy Star, energy efficient, water efficient, and low standby products covered by this policy is available via the Internet at *http://www.eere.energy.gov/femp/technologies/eeproducts.cfm.*

Subpart 423.4—Use of Recovered Materials

423.400 Scope of subpart.

This subpart implements and supplements FAR policies and procedures for acquiring products and services when preference is given to offers of products containing recovered materials. This subpart further supplements FAR subpart 23.4 by providing guidance for affirmative procurement programs in accordance with Executive Order 13101 and 42 U.S.C. 6962.

423.402 [Reserved]

423.403 Policy.

It is the policy of USDA to acquire and use Environmental Protection Agency (EPA) designated recycled content products.

423.404 Agency affirmative procurement programs.

The USDA affirmative procurement program (APP) policy applicable to all USDA agencies and staff offices is hereby established. The components of this APP include:

(a) *Recovered Materials Preference Program.* In accord with the requirements of Section 402(c) of Executive Order 13101, Greening the Government Through Recycling, Waste Prevention, and Federal Acquisition, USDA agencies will include, in all applicable solicitations and contracts, a preference for products and services which meet or exceed the EPA purchasing guidelines as contained in the EPA product Recovered Materials Advisory Notices (RMANs). Agencies may choose an evaluation factor preference, or other method of indicating preference in accord with their agency needs. Agencies will, as appropriate, eliminate virgin material requirements in contract specifications and replace them with a statement of preference for recycled materials.

(b) *Promotion program.* USDA agencies will actively promote a preference for recovered materials, environmentally preferable products, and biobased products in contacts with vendors, in written materials, and other appropriate opportunities.

(c) *Reasonable estimation of recovered materials used in the performance of contracts.* USDA agencies annually will provide in writing to the USDA Senior Procurement Executive, in response to a call for data for the Resource Conservation and Recovery report, reasonable estimates, certification, and verification of recovered material used in the performance of contracts.

(d) *Annual review and monitoring of effectiveness of the program.* USDA agencies will provide an annual assessment of the effectiveness of their affirmative procurement program actions in increasing the purchase and use of EPA designated products.

(e) *Purchase of EPA designated products.* USDA agencies will require that 100% of purchases of EPA-designated products contain recovered material, unless the item cannot be acquired—

(1) Competitively within a reasonable time frame;

(2) Meeting appropriate performance standards; or

(3) At a reasonable price.

(f) The 100% purchase requirement of paragraph (e) of this section applies to all USDA agency purchases, including those at or below the micro-purchase threshold.

423.405 Procedures.

(a) The threshold of purchase for EPA designated items is $10,000 per year at the USDA departmental, not individual agency, level. Therefore, the APP requirements above, including the 100% purchase requirement, apply at the individual agency and staff office level.

(b) Contracting officers should refer to EPA's list of designated products and products identified as recycled content when purchasing supplies or services. Information on EPA designated products is available at: *www.epa.gov/cpg/products.htm.*

(c) All agencies and USDA Contracting Officers must take necessary actions to carry out the provisions of the USDA APP policy described in this subpart.

Subpart 423.5—Drug-Free Workplace

423.506 Suspension of payments, termination of contract, and debarment and suspension actions.

(a) The contracting officer may recommend waiver of the determination to suspend payments, to terminate a contract, or to debar or to suspend a contractor.

(b) The recommendation shall be submitted through the HCA to the SPE and shall include a full description of the disruption of USDA operations should the determination not be waived.

(c) The SPE will submit the request for a waiver to the Secretary with a recommendation for action.

Subpart 423.6—Notice of Radioactive Material

423.601 Requirements.

The HCA shall establish a system of instructions to identify the installation/facility radiation protection officer.

Subpart 423.7—Contracting for Environmentally Preferable Products and Services

423.703 Policy.

(a) USDA's Affirmative Procurement Program promotes energy-efficiency, water conservation, and the acquisition of environmentally preferable products and services. In its acquisitions, USDA will support federal ''green purchasing'' principles in the acquisition of products and services that are environmentally preferable or that are biobased content products and services.

(b) USDA agencies will actively promote this preference for environmentally preferable products and biobased products in contacts with vendors, in written materials, and other appropriate opportunities.

PART 424—PROTECTION OF PRIVACY AND FREEDOM OF INFORMATION

■ 45. Revise 424.203 to read as follows:

424.203 Policy.

USDA regulations implementing the Freedom of Information Act are found in 7 CFR, Subtitle A, Part 1, Subpart A. Contracting officers shall follow these regulations when responding to requests for information.

PART 425—FOREIGN ACQUISITION

■ 46. Revise the table of contents of part 425 to read as follows:

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

■ 47. Revise subpart 425.1 to read as follows:

Subpart 425.1—Buy American Act—Supplies

425.102 [Reserved]

425.103 Exceptions.

(a) The Senior Procurement Executive (SPE) shall make the determination prescribed in FAR 25.103(a).

(b) Copies of determinations of nonavailability in accordance with FAR 25.103(b)(2) or 25.202(a)(2), for articles, material or supplies not listed in FAR 25.104, may be submitted to the SPE for submission to the Civilian Agency Acquisition Council (CAAC).

425.104 Nonavailable articles.

Information required by FAR 25.104(b) shall be submitted to the SPE for submission to the CAAC.

425.105 Determining reasonableness of cost.

The SPE may make the determination prescribed in FAR 25.105(a). Requests for a determination by the SPE shall be submitted by the HCA, in writing, and shall provide a detailed justification supporting why evaluation factors higher than those listed in FAR 25.102(b)(1) and (2) should be applied to determine whether the offered price of a domestic end product is unreasonable.

425.108 [Reserved]

■ 48. Amend 425.202 as follows:

■ a. In the heading of 425.202, remove the word ''Policy'' and add, in its place, ''Exceptions''.

■ b. Remove ''FAR 25.202(a)(3)'', and add, in its place, ''FAR 25.202(a)(1)''.

Subpart 425.3—[Removed and Reserved]

■ 49. Remove and reserve subpart 425.3.

Subpart 425.4—[Removed and Reserved]

■ 50. Remove and reserve subpart 425.4.

■ 51. Add subpart 425.6, to read as follows:

Subpart 425.6—Trade Sanctions

425.602 Exceptions.

The Secretary, without power of redelegation, has the authority to make the necessary determination(s) and authorize award(s) of contract(s) in accordance with FAR 25.602(b).

Subpart 425.9—[Removed and Reserved]

■ 52. Remove and reserve subpart 425.9.

■ 53. Revise subpart 425.10 to read as follows:

Subpart 425.10—Additional Foreign Acquisition Regulations

425.1001 Waiver of right to examination of records.

The SPE shall make the determination under FAR 25.1001(a)(2)(iii).

PART 426—OTHER SOCIOECONOMIC PROGRAMS

■ 54. Remove and reserve subpart 426.70.

PART 428—BONDS AND INSURANCE

■ 55. Revise the heading of subpart 428.1 to read as follows:

Subpart 428.1—Bonds And Other Financial Protections

■ 56. Revise the heading of subpart 428.2 to read as follows:

Subpart 428.2—Sureties And Other Security For Bonds

PART 432—CONTRACT FINANCING

■ 57. Redesignate 432.905 as 432.904, and revise the section heading to read as follows:

432.904 Determining payment due dates.

■ 58. Redesignate 432.906 as 432.007.

PART 433—PROTESTS, DISPUTES AND APPEALS

■ 59. In Part 433, revise all references to ''General Accounting Office'' to read ''Government Accountability Office''.

433.104 [Removed and Reserved]

■ 60. Remove and reserve 433.104.

PART 434—MAJOR SYSTEM ACQUISITION

■ 61. Revise Part 434 to read as follows:

Subpart 434.0—General

Sec.
434.001 Definitions.
434.002 Policy.
434.003 Responsibilities.
434.004 Acquisition strategy.
434.005 General requirements.
434.005–6 Full production.

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

Subpart 434.0—General

434.001 Definitions.

Pursuant to OMB Circular No. A–109 (A–109) and the definition at FAR 2.101, within USDA, a system shall be considered a major system if:

(a) The total acquisition costs (for information technology, life cycle costs) are estimated to be $50 million or more, or

(b) The system, regardless of estimated acquisition or life cycle costs, has been specifically designated to be a major system by the USDA Acquisition Executive or by the Major Information Technology Systems Executive.

434.002 Policy.

In addition to the policy guidance at FAR 34.002 and other parts of the FAR, the policies outlined in paragraph 6 of A–109 should serve as guidelines for all contracting activities in planning and developing systems, major or otherwise.

434.003 Responsibilities.

(a) The Secretary of Agriculture or other designated USDA key executive is responsible for making four key decisions in each major system acquisition process. These are listed in paragraph 9 of A–109 and elaborated on in paragraphs 10 through 13. The key executives of USDA (Secretary, Deputy Secretary, Under Secretaries and Assistant Secretaries) individually or as a group will participate in this decision making process.

(b) The Chief Information Officer (CIO) is the Major Information Technology Systems Executive. For acquisitions of information technology, the CIO will ensure that A–109 is implemented in USDA and that the management objectives of the Circular are realized. The CIO is responsible for designating the program manager for each major information technology system acquisition, designating an acquisition to be a major information technology system acquisition, and approving the written charter and project control system for each major information technology system acquisition.

(c) The Assistant Secretary for Administration (ASA) is the USDA Acquisition Executive for major system acquisitions other than acquisitions of information technology. The ASA will ensure that A–109 is implemented in USDA and that the management objectives of the Circular are realized. The ASA is responsible for designating the program manager for each major system acquisition, designating an acquisition to be a major system acquisition, and approving the written charter and project control system for each major system acquisition.

(d) Heads of contracting activities must:

(1) Ensure compliance with the requirements of A–109, FAR Part 34 and AGAR Part 434.

(2) Ensure that potential major system acquisitions are brought to the attention of the USDA Acquisition Executive or the Major Information Technology Systems Executive, as appropriate.

(3) Recommend qualified candidates for designation as program managers for each major system acquisition within their jurisdiction.

(4) Ensure that program managers fulfill their responsibilities and discharge their duties.

(5) Cooperate with the ASA and Major Information.

Technology Systems Executive in implementing the requirements of A–109.

(e) The program manager is responsible for planning and executing the major system acquisition, ensuring appropriate coordination with the USDA Acquisition Executive and Major Information Technology Systems Executive and other key USDA executives.

434.004 Acquisition strategy.

(a) The program manager will develop, in coordination with the Acquisition Executive or Major Information Technology Systems Executive, a written charter outlining the authority, responsibility, accountability, and budget for accomplishing the proposed objective.

(b) The program manager will develop, subject to the approval of the Acquisition Executive or Major Information Technology Systems Executive, a project control system to schedule, monitor, and regularly report on all aspects of the project. The control system shall establish reporting periods and milestones consistent with the key decisions listed in paragraph 9 of A–109.

(c) Upon initiation of the project, the program manager will report regularly to the Acquisition Executive or Major Information Technology Systems Executive.

(d) Specific procedures and requirements for information technology systems are included in the USDA Information Technology Capital Planning and Investment Control Guide which can be accessed on the USDA OCIO Web site at *http://www.ocio.usda.gov.*

434.005 General requirements.

434.005–6 Full production.

The Secretary or the USDA key executive designated by the Secretary for the specific program is the agency head for the purposes of FAR 34.005–6.

PART 436—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

436.578 [Removed and Reserved]

■ 62. Remove and reserve 436.578.

PART 439—ACQUISITION OF INFORMATION TECHNOLOGY

■ 63. Add Part 439 to read as follows:

Subpart 439.1—General

Sec.
439.101 Policy.

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

Subpart 439.1—General

439.101 Policy.

(a) In addition to policy and regulatory guidance contained in the FAR and AGAR:

(1) The USDA Information Technology Capital Planning and Investment Control Guide (CPIC) establishes requirements for the acquisition of information technology.

(2) Specific thresholds at which USDA Office of the Chief Information Officer Information Technology Acquisition Approval is required have been established.

(3) The procurement authority delegated to USDA Agencies is established in Departmental Regulations 5000 series.

(4) The CPIC Guide and USDA CIO policy and procedural guidance are available on the USDA OCIO Web site at *http://www.ocio.usda.gov.* Notices of changes in the Information Technology Acquisition Approval Thresholds are also promulgated by AGAR Advisory.

(b) Acquisition of on-line courseware libraries and learning management system services requires specific

approval of the ASA and CIO. Information regarding the specific approval requirements and processes is promulgated by AGAR Advisory.

PART 445—GOVERNMENT PROPERTY

Subpart 445.6—[Removed and Reserved]

■ 64. Remove and reserve subpart 445.6.

PART 450—EXTRAORDINARY CONTRACTUAL ACTIONS

Subpart 450.1—[Removed and Reserved]

■ 65. Remove and reserve subpart 450.1.

PART 452—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

452.211–70 [Amended]

■ 66. Amend paragraph (a) of 452.211–70 to remove the words ''clause 452.211–2'' and add, in their place, ''clause 452.211–71''.

452.215–71 [Amended]

■ 67. In paragraph (c) of 452.215–71, remove the words ''Requirements for Cost or Pricing Data or Other Than Cost or Pricing Data'' and add, in their place, ''Requirements for Cost or Pricing Data or Information Other Than Cost or Pricing Data''.

452.226–70, 452.226–71 and 452.226–72 [Removed and Reserved]

■ 68. Remove and reserve 452.226–70, 452.226–71, and 452.226–72.

452.232–70 [Amended]

■ 69. In 452.232–70, remove the words ''Payments Under Fixed-Price Construction Contract'' and add, in their place, ''Payments Under Fixed-Price Construction Contracts''.

452.236–78 [Removed and Reserved]

■ 70. Remove and reserve 452.236–78.

PART 453—FORMS

■ 71. Revise 453.213 to read as follows:

453.213 Simplified Acquisition and other simplified purchase procedures (AD–838).

Form AD–838, *Purchase Order,* is prescribed for use as a Simplified Acquisition Procedure/delivery order/task order document in lieu of OF 347 and OF 348, except that use of the OF 347 and OF 348 is authorized when utilizing the USDA Integrated Acquisition System (See 413.307).

Done in Washington, DC, this 21st day of December, 2004.

W.R. Ashworth,

Director, Office of Procurement and Property Management.

[FR Doc. 04–28439 Filed 12–30–04; 8:45 am]

BILLING CODE 3410–96–P

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

49 CFR Part 199

[Docket RSPA–97–2995; Notice 12]

Pipeline Safety: Random Drug Testing Rate

AGENCY: Research and Special Programs Administration (RSPA), DOT.

ACTION: Notice of minimum annual percentage rate for random drug testing.

SUMMARY: Each year pipeline operators randomly select employees to test for prohibited drugs. The number of selections may not be less than the minimum annual percentage rate the Research and Special Programs Administration's (RSPA) Office of Pipeline Safety (OPS) determines, either 50 percent or 25 percent of covered employees, based on the industry's positive rate of random tests. In accordance with applicable standards, RSPA/OPS has determined that the positive rate of random drug tests reported by operators this calendar year for testing done in calendar year 2003 is less than 1.0 percent. Therefore, in calendar year 2005, the minimum annual percentage rate for random drug testing is 25 percent of covered employees.

DATES: Effective January 1, 2005, through December 31, 2005.

FOR FURTHER INFORMATION CONTACT: Sheila Wright, RSPA, OPS, Room 2103, U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590, telephone (202) 366–4554 or e-mail *sheila.wright@rspa.dot.gov.*

SUPPLEMENTARY INFORMATION: Operators of gas, hazardous liquid, and carbon dioxide pipelines and operators of liquefied natural gas facilities must annually submit Management Information System (MIS) reports of drug testing done in the previous calendar year (49 CFR 199.119(a)). One of the uses of this information is to calculate the minimum annual percentage rate at which operators must randomly select covered employees for drug testing during the next calendar year (49 CFR 199.105(c)(2)). If the minimum annual percentage rate for random drug testing is 50 percent, RSPA/OPS may lower the rate to 25 percent if RSPA/OPS determines that the positive rate reported for random tests for two consecutive calendar years is less than 1.0 percent (49 CFR 199.105(c)(3)). If the minimum annual percentage rate is 25 percent, RSPA/OPS will increase the rate to 50 percent if RSPA/OPS determines that the positive rate reported for random tests for any calendar year is equal to or greater than 1.0 percent (49 CFR 199.105(c)(4)). Part 199 defines ''positive rate'' as ''the number of positive results for random drug tests * * * plus the number of refusals of random tests * * *, divided by the total number of random drug tests * * * plus the number of refusals of random tests. * * *''

Through calendar year 1996, the minimum annual percentage rate for random drug testing in the pipeline industry was 50 percent of covered employees. Based on MIS reports of random testing done in calendar years 1994 and 1995, RSPA/OPS lowered the minimum rate from 50 percent to 25 percent for calendar year 1997 (61 FR 60206; November 27, 1996). The minimum rate remained at 25 percent in calendar years 1998 (62 FR 59297; Nov. 3, 1997); 1999 (63 FR 58324; Oct. 30, 1998); 2000 (64 FR 66788; Nov. 30, 1999); 2001 (65 FR 81409; Dec. 26, 2000); 2002 (67 FR 2611; Jan. 18, 2002); 2003 (67 FR 78388; Dec. 24, 2002); and 2004 (68 FR 69046; Dec. 11, 2003).

Using the MIS reports received this year for drug testing done in calendar year 2003, RSPA/OPS calculated the positive rate of random testing to be 0.83 percent. Since the positive rate continues to be less than 1.0 percent, RSPA/OPS is announcing that the minimum annual percentage rate for random drug testing is 25 percent of covered employees for the period January 1, 2005 through December 31, 2005.

Authority: 49 U.S.C. 5103, 60102, 60104, 60108, 60117, and 60118; 49 CFR 1.53.

Issued in Washington, DC on December 22, 2004.

Stacey L. Gerard,

Associate Administrator for Pipeline Safety.

[FR Doc. 04–28679 Filed 12–30–04; 8:45 am]

BILLING CODE 4910–60–P

Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2004–19945; Directorate Identifier 2004–NM–22–AD]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 747–200B, 747–200C, 747–200F, 747–300, and 747SR Series Airplanes Equipped with General Electric (GE) CF6–45 or –50 Series Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for certain Boeing Model 747–200B, 747–200C, 747–200F, 747–300, and 747SR series airplanes, equipped with GE CF6–45 or –50 series engines. This proposed AD would require modifying the side cowl assemblies on the engines by replacing existing wear plates with new extended wear plates and installing new stop fittings. This proposed AD is prompted by reports of a gap at the interface of the lower portion of the side cowl and the aft flange of the thrust reverser. We are proposing this AD to prevent an excessive quantity of air from entering the fire zone that surrounds the engine, which in the event of an engine fire, could result in an inability to control or extinguish the fire.

DATES: We must receive comments on this proposed AD by February 17, 2005.

ADDRESSES: Use one of the following addresses to submit comments on this proposed AD.

- DOT Docket Web site: Go to *http://dms.dot.gov* and follow the instructions for sending your comments electronically.
- Government-wide rulemaking Web site: Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- Mail: Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street SW., Nassif Building, room PL–401, Washington, DC 20590.
- By fax: (202) 493–2251.
- Hand Delivery: Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124–2207.

You can examine the contents of this AD docket on the Internet at *http://dms.dot.gov,* or in person at the Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street SW., room PL–401, on the plaza level of the Nassif Building, Washington, DC. This docket number is FAA–2004–19945; the directorate identifier for this docket is 2004–NM–22–AD.

FOR FURTHER INFORMATION CONTACT: Dan Kinney, Aerospace Engineer, Propulsion Branch, ANM–140S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 917–6499; fax (425) 917–6590.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to submit any written relevant data, views, or arguments regarding this proposed AD. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2004–19945; Directorate Identifier 2004–NM–22–AD'' in the subject line of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the proposed AD. We will consider all comments submitted by the closing date and may amend the proposed AD in light of those comments.

We will post all comments we receive, without change, to *http://dms.dot.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact with FAA personnel concerning this proposed AD. Using the search function of that website, anyone can find and read the comments in any of our dockets, including the name of the individual who sent the comment (or signed the comment on behalf of an association, business, labor union, etc.). You can review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78), or you can visit *http://dms.dot.gov.*

Examining the Docket

You can examine the AD docket on the Internet at *http://dms.dot.gov,* or in person at the Docket Management Facility office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Management Facility office (telephone (800) 647–5227) is on the plaza level of the Nassif Building at the DOT street address stated in the **ADDRESSES** section. Comments will be available in the AD docket shortly after the DMS receives them.

Discussion

We have received reports indicating that a gap may form at the interface of the lower portion of the side cowl and the aft flange of the thrust reverser on certain Boeing Model 747–200B, 747–200C, 747–200F, 747–300, and 747SR series airplanes, equipped with General Electric CF6–45 or –50 series engines. The gap forms when high engine thrust is applied, but may not always close when thrust is reduced. The gap is attributed to axial deflection of the engine case combined with the difference in the rate of expansion due to heat between the aluminum frame of the thrust reverser and the titanium frame of the engine. The gap may allow an excessive quantity of air into the nacelle surrounding the engine, which is a fire zone that is equipped with fire detection, containment, and extinguishing provisions. However, excess air in the area could defeat some or all of the fire protection provisions. This condition, if not corrected, could result in an inability to control or extinguish an engine fire.

Relevant Service Information

We have reviewed Boeing Service Bulletin 747–71–2300, Revision 1, dated October 30, 2003. The service bulletin describes procedures for modifying the side cowl assemblies on the engines by replacing existing wear plates with new extended wear plates and installing new stop fittings. The procedures for replacing the existing wear plates include performing open-hole high frequency eddy current (HFEC)

inspections for cracking of existing fastener holes, and creating new fastener holes and plugging existing holes if necessary. The procedures for installing the new stop fittings involves installing brackets, channels, and wear pads; replacing existing fasteners with new fasteners if necessary; performing open-hole HFEC inspections for cracking of fastener holes; and oversizing fastener holes and installing different-sized fasteners if necessary. Accomplishing the actions specified in the service information is intended to adequately address the unsafe condition.

Boeing Service Bulletin 747–71–2300, Revision 1, refers to Boeing Service Letter 747-SL–71–045-C, dated April 10, 2003, as the applicable source of service information for doing certain recommended actions. Among other actions, Boeing Service Letter 747-SL–71–045-C describes procedures for improving the aerodynamic smoothness of the side cowl assemblies by removing bulb seals that may have been installed on the trailing edge of the fan thrust reverser in accordance with a previous issue of Boeing Service Letter 747-SL–71–045. The procedures for removing the bulb seals include plugging open holes on the trailing edge of the fan thrust reverser, and adjusting the cowl latches if necessary.

FAA's Determination and Requirements of the Proposed AD

We have evaluated all pertinent information and identified an unsafe condition that is likely to exist or develop on other airplanes of this same type design. Therefore, we are proposing this AD, which would require modifying the side cowl assemblies on the engines by replacing existing wear plates with new extended wear plates, and installing new stop fittings. The proposed AD would require you to use the service information described previously to perform these actions, except as discussed under ''Differences Between the Proposed AD and Service Information.''

Differences Between the Proposed AD and Service Information

Section 1.B., ''Concurrent Requirements,'' of Boeing Service Bulletin 747–71–2300, Revision 1, states that the service bulletin ''assumes that the cowls have had wear plates installed per Service Bulletin 747–54–2093.'' We have determined that Boeing Service Bulletin 747–71–2300, Revision 1, refers to Boeing Service Bulletin 747–54–2093 only because Boeing Service Bulletin 747–71–2300, Revision 1, removes certain parts that may have been installed according to Boeing Service Bulletin 747–54–2093. We have discussed this matter with Boeing and have determined that the Accomplishment Instructions in Boeing Service Bulletin 747–71–2300, Revision 1, are effective regardless of whether Boeing Service Bulletin 747–54–2093 has been done. In light of this information, this proposed AD would not require the actions in Boeing Service Bulletin 747–54–2093.

Boeing Service Bulletin 747–71–2300, Revision 1, also ''assumes'' that one certain airplane has been modified to have a narrower trailing edge strip. We have determined that the subject airplane has been modified; thus, this proposed AD would not require this modification.

As described previously, Boeing Service Bulletin 747–71–2300, Revision 1, recommends that bulb seals installed previously in accordance with a previous issue of Boeing Service Letter 747–SL–71–045 be removed in accordance with Boeing Service Letter 747–SL–71–045–C, dated April 10, 2003. If the bulb seals were previously installed, paragraph (g) of this proposed AD would require you to remove them concurrent with or before further flight after accomplishing the actions in Boeing Service Bulletin 747–71–2300, Revision 1.

Costs of Compliance

This proposed AD would affect about 38 airplanes of U.S. registry and 140 airplanes worldwide. The following table provides the estimated costs for U.S. operators to comply with this proposed AD.

ESTIMATED COSTS

Action	Work hours	Average labor rate per hour	Parts	Cost per airplane	Fleet cost
Modification per Boeing Service Bulletin 747–71–2300, Revision 1	72	$65	$25,736	$30,416	$1,155,808

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority.

This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart III, Section 44701, ''General requirements.'' Under that section, the FAA is charged with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this proposed AD.

Regulatory Findings

We have determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that the proposed regulation:

1. Is not a ''significant regulatory action'' under Executive Order 12866;

2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD. See the **ADDRESSES** section for a location to examine the regulatory evaluation.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator,

the FAA proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

2. The FAA amends § 39.13 by adding the following new airworthiness directive (AD):

Boeing: Docket No. FAA–2004–19945; Directorate Identifier 2004–NM–22–AD. Comments Due Date.

(a) The Federal Aviation Administration (FAA) must receive comments on this AD action by February 17, 2005.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Boeing Model 747–200B, 747–200C, 747–200F, 747–300, and 747SR series airplanes; certificated in any category; equipped with General Electric CF6–45 or –50 series engines.

Unsafe Condition

(d) This AD was prompted by reports of a gap at the interface of the lower portion of the side cowl and the aft flange of the thrust reverser. We are issuing this AD to prevent an excessive quantity of air from entering the fire zone that surrounds the engine, which, in the event of an engine fire, could result in an inability to control or extinguish the fire.

Compliance

(e) You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

Modification

(f) Within 24 months after the effective date of this AD: Modify the side cowl assemblies on the engines by replacing existing wear plates with new extended wear plates and installing new stop fittings, by doing all actions according to the Accomplishment Instructions of Boeing Service Bulletin 747–71–2300, Revision 1, dated October 30, 2003. Any applicable corrective actions must be done before further flight.

On Condition: Removal of Bulb Seals and Other Specified Actions

(g) If bulb seals were installed on the trailing edge of the fan thrust reverser in accordance with Boeing Service Letter 747–SL–71–045: Concurrent with or before further flight after accomplishing paragraph (f) of this AD, remove the bulb seals, plug the open holes in the trailing edge of the fan thrust reverser, and adjust the cowl latches as applicable, in accordance with Boeing Service Letter 747–SL–71–045–C, dated April 10, 2003.

Alternative Methods of Compliance (AMOCs)

(h) The Manager, Seattle Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested in accordance with the procedures found in 14 CFR 39.19.

Issued in Renton, Washington, on December 20, 2004.

Kevin M. Mullin,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–28667 Filed 12–30–04; 8:45 am]

BILLING CODE 4910–13–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[R06–OAR–2004–TX–0003; FRL–7856–6]

Approval and Promulgation of Implementation Plans; Texas; Victoria County Maintenance Plan Update

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve a State Implementation Plan (SIP) revision submitted by the Texas Commission on Environmental Quality (TCEQ) on February 18, 2003, concerning the Victoria County 1-hour ozone maintenance area. This SIP revision satisfies the Clean Air Act requirement as amended in 1990 for the second 10-year update to the Victoria County 1-hour ozone maintenance area.

DATES: Written comments should be received on or before February 2, 2005.

ADDRESSES: Comments may be mailed to Mr. Thomas Diggs, Chief, Air Planning Section (6PD–L), Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas, 75202–2733. Comments may also be submitted electronically or through hand delivery/courier by following the detailed instructions in the **ADDRESSES** section of the direct final rule located in the rules section of this **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Peggy Wade, Air Planning Section (6PD–L), Environmental Protection Agency, Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733, telephone (214) 665–7247; fax number 214–665–7263; e-mail address *wade.peggy@epa.gov*.

SUPPLEMENTARY INFORMATION: In the final rules section of this **Federal Register**, EPA is approving the State's SIP submittal as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this action rule, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

For additional information, see the direct final rule which is located in the rules section of this **Federal Register**.

Dated: December 17, 2004.

Richard E. Greene,

Regional Administrator, Region 6.

[FR Doc. 04–28701 Filed 12–30–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[R04–OAR–2004–KY–0002–200424; FRL–7856–8]

Approval and Promulgation of Implementation Plans for Kentucky: Inspection and Maintenance Program Removal for Jefferson County, KY; Source-Specific Nitrogen Oxides Emission Rate for Kosmos Cement Kiln

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve a revision to the Jefferson County, Kentucky portion of the Kentucky State Implementation Plan (SIP) which requests removal of three regulations from the active portion of the Kentucky SIP related to the Jefferson County inspection and maintenance (I/M) program. Kentucky requested in a September 22, 2003, SIP revision that these I/M regulations be moved to the contingency measures section of the Kentucky portion of the Louisville 1-Hour Ozone Maintenance Plan. EPA is also proposing to approve a source-specific SIP revision amending the nitrogen oxides (NO_X) emission rate for Kosmos Cement Company's cement kiln

as contained in a May 3, 2004, Board Order submitted on May 26, 2004, as a supplemental package to the September 2003 SIP revision.

DATES: Written comments must be received on or before February 2, 2005.

ADDRESSES: Submit your comments, identified by Regional Material in EDocket (RME) ID No. R04–OAR–2004–KY–0002, by one of the following methods:

1. Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.

2. Agency Web site: *http://docket.epa.gov/rmepub/.* RME, EPA's electronic public docket and comment system, is EPA's preferred method for receiving comments. Once in the system, select ''quick search,'' then key in the appropriate RME Docket identification number. Follow the on-line instructions for submitting comments.

3. E-mail: *notarianni.michele@epa.gov.*

4. Fax: (404) 562–9019.

5. Mail: ''R04–OAR–2004–KY–0002,'' Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960.

6. Hand Delivery or Courier: Deliver your comments to: Michele Notarianni, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, 12th floor, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding Federal holidays.

Instructions: Direct your comments to RME ID No. R04–OAR–2004–KY–0002. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://docket.epa.gov/rmepub/,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through RME, regulations.gov, or e-mail. The EPA RME Web site and the Federal regulations.gov Web site are ''anonymous access'' systems, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through RME or regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the electronic docket are listed in the RME index at *http://docket.epa.gov/rmepub/.* Although listed in the index, some information is not publicly available, *i.e.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in RME or in hard copy at the Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Michele Notarianni, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. Phone: (404) 562–9031. E-mail: *notarianni.michele@epa.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents

I. What Changes to the Kentucky SIP Were Submitted for EPA Approval?

In response to a 2002 Kentucky Legislative action to terminate the Jefferson County I/M program effective November 1, 2003, the Commonwealth of Kentucky submitted a revision to the Jefferson County, Kentucky portion of the Kentucky SIP on September 22, 2003. This revision repeals three SIP-approved regulations representing the Jefferson County I/M program, also known as the Jefferson County Vehicle Emissions Testing (VET) Program. The regulations requested for repeal are: Regulation 8.01, ''Mobile Source Emissions Control Requirements,'' Regulation 8.02, ''Vehicle Emissions Testing Procedure,'' and Regulation 8.03, ''Commuter Vehicle Testing Requirements.''

Kentucky requested in the September 22, 2003, submittal that the three VET Program regulations be moved from the active control measures portion of the SIP to the contingency measures portion of the Kentucky portion of the Louisville 1-Hour Ozone Maintenance Plan, which is part of the Kentucky SIP. The Jefferson County VET Program is a basic I/M program that includes on-board diagnostics (*i.e.*, OBD) and results in emission reductions of NO_X, volatile organic compounds (VOC), and carbon monoxide (CO). The VET Program began operation on January 2, 1984, to help meet nonattainment area requirements for the ozone and CO NAAQS effective at the time.

The Kentucky portion of the Louisville Metropolitan Statistical Area (MSA) is comprised of the Kentucky Counties of Bullitt, Oldham, and Jefferson. Presently, Jefferson County,

and portions of Bullitt and Oldham Counties, comprise the Kentucky portion of the Louisville 1-Hour Ozone Maintenance Area. This maintenance status means these counties were formerly designated nonattainment for the 1-hour ozone standard, are now attaining this standard, and have since been redesignated to attainment for the 1-hour ozone standard (October 23, 2001, 66 FR 53665). This area was previously classified as a moderate nonattainment area, thus the requirement for the I/M program. Jefferson County was redesignated to attainment for CO on April 16, 1990 (55 FR 14092). On April 30, 2004 (69 FR 23858), EPA designated Jefferson County, Kentucky nonattainment for the 8-hour ozone NAAQS, effective June 15, 2004. Currently, Jefferson County, Kentucky is violating the $PM_{2.5}$ NAAQS based on 2001–2003 air quality data. EPA identified Jefferson County as nonattainment for $PM_{2.5}$ on December 17, 2004.

As a supplemental package to the September 22, 2003, SIP revision, the Commonwealth of Kentucky submitted a February 20, 2004, proposed amendment to the Kentucky SIP in response to EPA's October 27, 2003, letter requesting further information. This proposed amendment identified for public comment potential emission reductions to compensate for the NO_X and VOC emission increases resulting from removing the Jefferson County VET Program as an active control measure in the SIP. To demonstrate non-interference with applicable requirements of the Act, EPA believes that the potential, compensating emission reductions must be equivalent to or greater than those achieved with the VET Program. Concurrently, the Louisville Metro Air Pollution Control District (*i.e.*, ''District'') also submitted this same package to EPA to solicit EPA's comments during the public comment period. The public hearing was held on March 31, 2004. On May 26, 2004, the Commonwealth of Kentucky submitted the final version of the supplemental information to replace the February 20, 2004, proposal. The May 26, 2004, final supplemental package provides the selected option for acquiring compensating equivalent emissions reductions from the Kosmos Cement Company (''Kosmos'') in Jefferson County and additional supporting documentation. To compensate for the closure of the VET Program, equivalent emissions are needed to replace an anticipated increase of 1.89 tons per summer day (tpsd) of VOC and 1.68 tpsd of NO_X in the year 2005.

II. What Authorities Apply to Moving the Jefferson County I/M Program to a Contingency Measure in the Kentucky SIP?

Section 110(l) of the Clean Air Act (*i.e.*, ''Act'') states:

> Each revision to an implementation plan submitted by a State under this Act shall be adopted by such State after reasonable notice and public hearing. The Administrator shall not approve a revision to a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress (as defined in section 171), or any other applicable requirement of this Act.

The states' obligation to demonstrate attainment of each of the NAAQS is considered as ''any applicable requirement(s) concerning attainment.'' A demonstration is necessary to show that this revision will not interfere with attainment or maintenance of the NAAQS, including the relatively new 8-hour ozone and $PM_{2.5}$ standards, or any other requirement of the Act.

With respect to the 1-hour ozone NAAQS, the Louisville area met the standard in 1999 and was redesignated to attainment for the 1-hour ozone standard on October 23, 2001 (66 FR 53665). As part of its redesignation, the area must have a plan to maintain the standard, called a ''maintenance plan.'' Under section 175A(a) of the Act, emission reduction programs in a maintenance plan for a NAAQS must be continued unless a demonstration is made that the future, projected emissions for the area, without credit for reductions due to the emission reduction program being removed, remain at or below the baseline attainment level of emissions identified in the maintenance plan. If such a demonstration is made, that program is eligible for removal from the SIP. However, section 175A(d) of the Act requires that available contingency measures in the maintenance plan include all measures in the SIP for the area before that area was redesignated to attainment. Since the VET Program was in the SIP prior to redesignation to attainment for ozone, the VET Program must be listed in the contingency portion of the 1-hour ozone maintenance plan as required by section 175A(d). Because Jefferson County was redesignated to attainment for CO prior to the passage of the 1990 Clean Air Act Amendments, which created section 175A, the maintenance plan requirements described above do not apply to Jefferson County for CO.

The District was able to demonstrate continued maintenance of the 1-hour ozone standard for the requisite timeframe without taking credit for reductions from the Jefferson County VET Program, as summarized in Section III below. This demonstration of maintenance is further described in the rule proposing approval of revisions to the Louisville 1-Hour Maintenance Plan published January 5, 2004, column 1, at page number 69 FR 303.

In addition, provisions in EPA's I/M rule, set forth in 40 CFR section 51.372(c) under the heading ''Redesignation requests,'' apply to the Jefferson County VET Program situation. These provisions were published January 5, 1995, at 60 FR 1735. The provisions indicate that certain areas seeking redesignation may submit only the authority for an I/M program rather than an implemented program in satisfaction of the applicable I/M requirements. Under these I/M rule provisions, a basic I/M area (*i.e.*, was required to adopt a basic I/M program) which has been redesignated to attainment for the 1-hour ozone NAAQS can convert the I/M program to a contingency measure as part of the area's 1-hour ozone maintenance plan, notwithstanding the new antibacksliding provisions in EPA's recent 8-hour ozone implementation rule. A basic I/M area which is designated nonattainment for the 8-hour ozone NAAQS, and which is not required to have an I/M program based on its 8-hour ozone designation, continues to have the option to move its I/M program to a contingency measure as long as the 8-hour nonattainment area can demonstrate that doing so will not interfere with its ability to comply with any NAAQS or any other applicable Clean Air Act requirement pursuant to section 110(l) of the Act. For further details on the application of 8-hour ozone anti-backsliding provisions to basic I/M programs in 1-hour ozone maintenance areas, please refer to the May 12, 2004, EPA Memorandum from Tom Helms, Group Leader, Ozone Policy and Strategies Group, Office of Air Quality Planning and Standards, and Leila H. Cook, Group Leader, State Measures and Conformity Group, Office of Transportation and Air Quality, to the Air Program Managers, the subject of which is ''1-Hour Ozone Maintenance Plans Containing Basic I/M Programs.'' A copy of this memorandum may be obtained at *http://www.epa.gov/ttn/oarpg/t1pgm.html* or on RME, EPA's electronic public docket and comment system at *http://docket.epa.gov/rmepub/*. To view the memorandum

posted in the docket for this action in RME, please follow the instructions under number 2 of the **ADDRESSES** section of this document.

III. What Is EPA's Analysis of Kentucky's Demonstration of No Interference With the 1-Hour Ozone and CO NAAQS?

The September 22, 2003, Kentucky SIP revision seeking removal of the VET Program includes an evaluation for the 1-hour ozone and the CO NAAQS of the potential emission impacts associated with increased emissions that would result from removal of the Jefferson County VET Program as an active control measure in the SIP. For the 1-hour ozone NAAQS, the submittal provides VOC and NO_X emission inventory data for the Kentucky portion of the Louisville MSA (*i.e.*, Jefferson County and portions of Bullitt and Oldham Counties) for 1999, the year the area met the 1-hour ozone NAAQS, and projected emission inventories for 2002, 2005, 2008, and 2012. The projected mobile source emission inventories for 2005, 2008, and 2012 do not include emission reduction credits from either the operation of Jefferson County's VET Program after 2003, or the Indiana I/M Program after 2006. As shown in Tables 1 and 2 below, projected, total VOC and NO_X emissions for 2002, 2005, 2008, and 2012 for the Kentucky portion of the Louisville 1-Hour Ozone Maintenance Area all fall below the emissions levels in 1999, when the area met the 1-hour standard. These VOC and NO_X emission totals include emissions from the point, area, mobile, and nonroad source categories. Thus, the area demonstrates continued maintenance of the 1-hour ozone NAAQS without the Jefferson County VET Program. These data and supporting documentation were also provided in the June 27, 2003, revision to the maintenance demonstration for the Kentucky portion of the Louisville 1-Hour Ozone Maintenance Plan. For additional information and EPA's rationale for approving this maintenance plan update, please refer to EPA's proposed approval of this revision published January 5, 2004 (69 FR 302).

TABLE 1.—KENTUCKY PORTION OF THE LOUISVILLE 1-HOUR OZONE MAINTENANCE AREA TOTAL VOC EMISSIONS (IN TONS PER SUMMER DAY) WITHOUT EMISSION REDUCTION CREDITS FOR VET PROGRAM AFTER 2003 OR INDIANA I/M PROGRAM AFTER 2006

County	1999	2002	2005	2008	2012
Jefferson	97.29	89.76	86.01	80.74	75.36
Bullitt portion	4.22	3.93	3.78	3.69	3.54
Oldham portion	3.58	3.28	3.13	3.03	2.91
Totals for KY portion of the area	105.09	96.97	92.92	87.46	81.81
1-Hour Ozone Maintenance Plan decrease from 1999	.....	8.12	12.17	17.63	23.28

TABLE 2.—KENTUCKY PORTION OF THE LOUISVILLE 1-HOUR OZONE MAINTENANCE AREA TOTAL NO_X EMISSIONS (IN TONS PER SUMMER DAY) WITHOUT EMISSION REDUCTION CREDITS FOR VET PROGRAM AFTER 2003 OR INDIANA I/M PROGRAM AFTER 2006

County	1999	2002	2005	2008	2012
Jefferson	217.71	188.24	123.21	109.23	92.82
Bullitt portion	3.87	3.83	3.59	3.20	2.65
Oldham portion	3.30	3.26	3.06	2.78	2.34
Totals for KY portion of the Area	224.88	195.33	129.86	115.21	97.81
1-Hour Ozone Maintenance Plan decrease from 1999	.....	29.55	95.02	109.67	127.07

The September 22, 2003, submittal also demonstrates through ''hot spot'' modeling that Jefferson County continues to maintain the CO NAAQS without any credit for the VET Program. Table 3 below shows the results of hot spot modeling using the CAL3QHC model for six, signalized intersections to determine air quality impacts from CO associated with traffic growth for 2008, 2012, and 2020. Using conservative assumptions to reflect worst case conditions, the modeling results show continued maintenance of the CO NAAQS through 2020. The 8-hour CO NAAQS is nine parts per million (ppm).

TABLE 3.—JEFFERSON COUNTY CO HOT SPOT MODELING

Intersection	CO emissions (in ppm)		
	2008	2012	2020
Hurstbourne Parkway and Shelbyville Road	7.36	7.76	8.28
Hurstbourne Parkway and Taylorsville Road	6.20	6.32	6.50
Shelbyville Road and Bowling Boulevard	6.20	6.52	6.90
Shelbyville Road and Oxmoor Lane	6.94	7.10	7.32
Breckenridge Lane and Dutchmans Lane	6.32	6.44	6.64
Preston Highway and Outer Loop	7.84	8.00	8.24

As further support of the CO hot spot modeling, Kentucky's submittal provides CO emission level data for Jefferson County based on the use of MOBILE6 with the most recent roadway planning assumptions and the assumption that the VET Program is not operating after November 1, 2003. The data in Table 4 below show a continuous decline in CO mobile source winter emissions from 1999 through 2020. Both the County CO hot spot data and the mobile emission levels show that closure of the VET Program will not interfere with maintenance of the CO NAAQS.

TABLE 4.—JEFFERSON COUNTY CO MOBILE SOURCE WINTER EMISSIONS

CO emissions in tons per day (tpd)	1999	2008	2012	2020
Jefferson County CO Mobile Source Winter Emissions	664.66	497.34	453.89	404.12
Reduction from 1999	.....	167.32	210.77	260.54

IV. What Is EPA's Analysis of Kentucky's Demonstration of Noninterference With the 8-Hour Ozone and Fine Particulate Matter NAAQS?

A. What Criteria Must Be Met?

On October 27, 2003, EPA sent a letter to Kentucky affirming that movement of the VET Program to a contingency measure would not interfere with the 1-hour ozone and CO NAAQS. The letter also requested additional information to show that removing the VET Program as an active control measure from the SIP would not interfere with the new 8-hour ozone and fine particulate matter standards. For these reasons, Kentucky submitted the supplemental information providing a demonstration that removal of the VET Program will not interfere with attainment of the 8-hour ozone and PM2.5 NAAQS.

In a May 11, 2004, letter from EPA to Louisville's Assistant County Attorney, EPA provided its interpretation of section 110(l) of the Clean Air Act as guidance in relation to an area such as Jefferson County that does not yet have an attainment demonstration for the new 8-hour ozone and fine particulate matter NAAQS. The May 11, 2004, letter notes that a strict interpretation of the requirement in section 110(l) of the Act would allow EPA to approve a SIP revision removing a SIP requirement only after determining based on a completed attainment demonstration that it would not interfere with applicable requirements concerning attainment and reasonable further progress. However, EPA recognizes that prior to the time areas are required to submit attainment demonstrations for the new NAAQS, this strict interpretation could prevent any changes to SIP control measures. EPA does not believe this strict interpretation is necessary or appropriate.

Prior to the time that attainment demonstrations are due for the 8-hour ozone and $PM_{2.5}$ standards, it is unknown what suite of control measures are needed for a given area to attain these standards. During this period, to demonstrate no interference with any applicable NAAQS or requirement of the Clean Air Act under section 110(l), EPA believes it is appropriate to allow states to substitute equivalent emission reductions to compensate for the control measure being moved from the active portion of the SIP to the contingency provisions, as long as actual emissions in the air are not increased. EPA concluded that preservation of the status quo air quality during the time new attainment demonstrations are being prepared will prevent interference with the states' obligations to develop timely attainment demonstrations. ''Equivalent'' emission reductions means reductions which are equal to or greater than those reductions achieved by the control measure to be removed from the active portion of the SIP. To show the compensating, emission reductions are equivalent, modeling or adequate justification must be provided. (*See* EPA memorandum from John Calcagni, Director, Air Quality Management Division, to the Air Directors in EPA Regions 1–10, September 4, 1992, pages 10 and 13.) As stated in the May 11, 2004, letter referenced earlier, the compensating, equivalent reductions must represent actual, new emission reductions achieved in a contemporaneous time frame to the termination of the existing SIP control measure, in order to preserve the status quo level of emissions in the air. In addition to being contemporaneous, the equivalent emissions reductions must also be permanent, enforceable, quantifiable, and surplus to be approved into the SIP.

Likewise, the achievement of equivalent emission reductions that meet the above criteria will satisfy any applicable requirements of section 193 of the Act, the General Savings Clause, which involves control requirements in effect prior to November 15, 1990.

B. What Is EPA's Analysis of Whether the Proposed Reductions Meet the Criteria of Permanent, Enforceable, Quantifiable, Surplus, Equivalent and Contemporaneous?

The May 26, 2004, supplemental package proposes for EPA approval compensating, equivalent emission reductions for the Jefferson County VET Program from the Kosmos Cement Company located in Jefferson County. The package provides an amended Board Order with Kosmos which reduces the Kosmos cement kiln's NO_X emission rate currently in the Kentucky SIP from 6.6 down to 4.755 pounds per ton of clinker produced (pptcp) by the kiln, based upon a rolling 30-day average. The following is a description of how the emission reductions at Kosmos meet the six criteria of permanent, enforceable, quantifiable, surplus, contemporaneous, and equivalent.

1. *Permanent:* The emission reductions at Kosmos are made permanent through the lowering of the facility's permitted NO_X emission rate from 6.6 to 4.755 pptcp, based upon a rolling 30-day average. This new emission rate of 4.755 pptcp NO_X is reflected in the Louisville Metro Air Pollution Control Board Order signed and effective in the District May 3, 2004. A Board Order is a regulatory instrument adopted by an air pollution control board which specifies air pollution control limits or requirements for a specific source or company. Approval of the SIP revision will make this order a portion of the federally enforceable Kentucky SIP.

2. *Enforceable:* The NO_X emission rate change for Kosmos is enforceable by the District through the May 3, 2004, Board Order and, upon final approval into the Kentucky SIP, will be enforceable by the EPA, as of the effective date of the final rulemaking.

3. *Surplus:* The NO_X emission reductions at Kosmos, as reflected in the emission rate reduction to 4.755 pptcp of NO_X, are surplus for two reasons. The

emission rate reduction is below what is already required in the Jefferson County portion of the Kentucky SIP, and the reduction is not from a Federal Control Measure that would occur without any State or local action. The new emission rate of 4.755 NO_X pptcp is a reduction below the current, SIP-approved NO_X emission rate requirement for Kosmos' cement kiln of 6.6 pptcp based upon a 30-day rolling average. This existing 6.6 pptcp rate was established to meet reasonably available control technology (RACT) requirements after the facility had made some modifications. EPA approved the 6.6 pptcp rate as a source-specific SIP revision to the Kentucky SIP on October 23, 2001 (66 FR 53665). Also, the current emission rate of 6.6 NO_X pptcp for Kosmos' cement kiln matches the standard for cement kilns set forth in the Kentucky SIP regulation 401 KAR 51:170, ''NO_X requirements for cement kilns,'' that was established to meet EPA's NO_X SIP Call requirements and was approved by EPA on April 11, 2002 (67 FR 17624). EPA's NO_X SIP Call is a Federal Control Measure which establishes NO_X reduction requirements for cement kilns beginning in 2004 as well as requirements for other source categories. EPA assumed an average 30 percent NO_X reduction from cement kilns in states' NO_X budgets. Kosmos' existing 6.6 pptcp limit reduces NO_X by greater than 30 percent from projected 2007 baseline emissions. (See EPA's rule published April 11, 2002 at 67 FR 17624.) Thus, the new 4.755 pptcp rate will provide reductions above and beyond those assumed to meet the NO_X SIP Call.

4. *Quantifiable:* The emission rate change for Kosmos meets the criterion for quantifiable as the net emissions decrease from the emission rate limit change may be calculated as follows.

The change in the NO_X emission rate: 6.6 pptcp (current SIP rate) − 4.755 (proposed rate) = 1.845 pptcp. The operating rate of the cement kiln is 4700 tons of clinker produced per day. The reduction of NO_X by changing the emission rate of Kosmos' cement kiln is: (1.845 pptcp) × (4700 tons of clinker produced per day) = 8672 pounds per day of NO_X.

5. *Contemporaneous:* While ''contemporaneous'' is not explicitly defined in the Clean Air Act, a reasonable interpretation is to enact the compensating, equivalent emissions reductions in this case well within one year (prior to or following) the cessation of the substituted control measure. The emission reductions at Kosmos are contemporaneous to the closing of the VET Program, which ceased operating as of November 1, 2003. Kosmos made changes in its operating procedures at the cement kiln beginning in March of 2003, which resulted in reductions of NO_X. This change occurred eight months prior to the closing of the VET Program. The May 26, 2004, submittal documents that the operating procedure changes at Kosmos resulted in 30-day rolling averages ranging from 2.1 to 4.1 NO_X pptcp during the April to December 2003 timeframe. Enacting the equivalent reductions at Kosmos prior to (rather than after) the cessation of the VET Program provides additional assurance that there is no net emissions increase to the air for any period of time. The District issued a May 3, 2004, Board Order making permanent and enforceable the lowered NO_X emission rate of 4.755 pptcp.

6. *Equivalent:* To demonstrate that Kosmos' NO_X emission reductions, as reflected in the facility's emission rate change from 6.6 to 4.755 NO_X ppctp, provide the equivalent benefit of the emission reductions achieved by the VET Program, the District first identified what emissions reductions were achieved by the VET Program for a particular year. The VET Program reduces emissions of VOC, NO_X, and CO. VOC and NO_X are contributors (''precursors'') to the formation of ground-level ozone and, to a lesser extent, fine particulate matter. Thus, to demonstrate equivalent emissions reductions for the 8-hour ozone and $PM_{2.5}$ NAAQS, VOC and NO_X need to be considered, whereas CO reductions are not relevant for this demonstration.

a. Selection of the Year 2005 To Estimate Emission Increases From Closure of the VET Program

The District selected the year 2005 to calculate what the VOC and NO_X emission increases will be without the VET Program because the District had already developed VOC and NO_X emission projections data for that year for the Kentucky portion of the Louisville 1-Hour Ozone Maintenance Plan submitted to EPA on June 27, 2003. Although the VET Program ended as of November 1, 2003, the 2003 ozone season had already ended by that time. Thus, emission increases from the cessation of the VET Program would begin to affect ozone formation for the 2004 ozone season. Also, as described in detail in the next subsection below, the District demonstrated that the year 2005 provides the greatest number of VET Program emissions that need to be replaced. Thus, EPA believes that analyzing emissions for 2005 is representative of the 2004 period when emissions from the loss of the VET Program would first impact the area.

In addition to the reasons listed above, the EPA believes the year 2005 provides a conservative estimate of the amount of VET Program emissions which need to be compensated for several reasons. One reason is due to how the MOBILE model operates. The MOBILE model estimates emissions from vehicles on an annual basis. The model uses either January or July to estimate vehicle emissions. July would be selected as the month to predict vehicle emissions since July falls during the ozone season. When the model is run for 2005, the timeframe evaluated is from July 2004 to June 2005. During this timeframe, no vehicles were tested by the VET Program and thus, higher vehicle emissions are predicted. Running the MOBILE model for 2004 would cover July 2003 to June 2004, which would capture the emission benefits from vehicles tested during the July 1 to October 31, 2004, timeframe, prior to cessation of the program. Thus, 2004 vehicle emission MOBILE6 estimates would be slightly lower due to credit from the four months of the VET Program's operation from July 1 to October 31, 2004. The higher vehicle emission estimates mean greater compensating, equivalent reductions are needed to replace the VET Program.

Another reason that 2005 is a conservative estimate of the VET Program emissions which need to be replaced is that the VET Program ceased operation as of November 1, 2003, after the 2003 ozone season, which runs from March to October. Thus, the Program continued to provide emission reduction benefits for the 2003 ozone season. While the year 2004 could be used to show the increase in emissions from the VET Program, 2005 shows a greater increase in emissions due to cessation of the VET Program and thus, demands more compensating emissions. A likely cause for this increase is that the year 2004 still reflects residual emission reduction benefits due to changes to vehicles made within the past several years, depending on the type of repair done and the length of time since the repair was completed. These residual benefits are expected to taper off over time.

Further support for the use of 2005 as a more conservative choice to estimate VET Program reductions is that the vehicle miles traveled (VMT) in 2005 will be slightly higher than in 2004, which yields greater vehicle emissions when input into the MOBILE model without the VET Program in operation than if the emissions were calculated using 2004 VMT data. The MOBILE model is used to calculate the emissions from onroad mobile sources, *e.g.*, cars

and trucks. Higher vehicle emissions predicted from the MOBILE model require greater compensating, equivalent emission reductions to replace the VET Program.

b. Methodology for Substituting NO_X for VOC To Determine All ''NO_X-Equivalent'' Needed To Replace the VET Program

Due to closure of the VET Program, mobile source emissions in the year 2005 are predicted to increase by 1.89 tpsd of VOC and 1.68 tpsd of NO_X. To determine the number of VOC and NO_X emissions needing to be replaced, the District converted all the VOC into NO_X using a ratio developed in accordance with the August 5, 1994, EPA memorandum, ''Clarification of Policy for Nitrogen Oxides (NO_X) Substitution,'' from John Seitz, Director, Office of Air Quality Planning and Standards. This memorandum pertains to EPA's ''NO_X Substitution Guidance'' (December 1993). The guidance acknowledges that controlling only VOCs may not be the most effective approach in all areas for attaining the ozone standard and allows for substitution of NO_X for VOC emission reductions, contingent upon approval by EPA. The 1994 memorandum further clarifies that NO_X for VOC substitution is a viable approach prior to completing modeling to support an area's attainment demonstration.

To determine the amount of NO_X that will provide equivalent ozone reduction benefits as VOC, EPA's NO_X Substitution Guidance (December 1993) allows, on a percentage basis, substitution of NO_X for VOC, that is a 1% reduction in VOC requires at least a 1% reduction of NO_X. In the May 26, 2004, supplement, the District calculated NO_X/VOC ratios for 2005, 2008, and 2012, because the District had emission inventory projections for these years. In contrast, the 2004 emission levels used for the NO_X/VOC ratio were developed by interpolating between the 2002 and 2005 emission inventory projections after subtraction of 2004 NO_X reductions due to NO_X SIP call requirements. To calculate the NO_X/VOC ratio for a given year, the total NO_X emissions are divided by the total VOC emissions from all source categories in Jefferson County for that year. For example, in 2004, the total emissions from Jefferson County sources are estimated at 95.62 tpsd VOC and 134.36 tpsd NO_X. The District calculated that, on a percentage basis, the projected ratio of NO_X to VOC emissions from all source categories in Jefferson County for 2004 is 1.41 using predicted 2004 total emissions (*i.e.*, 134.36 tpsd NO_X divided by 95.62 tpsd VOC). This ratio means that reducing 1.41 tpsd of NO_X is equivalent, in terms of ozone formation, to reducing 1.00 tpsd of VOC. Table 5 lists the ratios that the District calculated and provided to EPA.

TABLE 5.—NO_X/VOC RATIOS

Emissions from all source categories in Jefferson County (tpsd)	2002	2004	2005	2008	2012
VOC	96.97	95.62	92.92	87.46	81.81
NO_X	195.33	134.36	129.86	115.21	97.81
NO_X/VOC	2.01	1.41	1.40	1.32	1.20

The District chose the 2004 NO_X/VOC ratio to convert into NO_X the projected 2005 VOC emission increases from closure of the VET Program because this provides the largest amount of emissions to substitute for the VET Program as compared to using NO_X/VOC ratios for 2005, 2008, or 2012, with the respective emission projections for those years. Please refer to Table 6 below for a comparison of how the NO_X/VOC ratios for years 2004, 2005, 2008, and 2012 as applied to these same years (with the exception of 2004) affect the amount of resulting NO_X-equivalent to be replaced by converting all VOC reductions from the VET Program to NO_X.

As shown in Table 6 below, to calculate the amount of emission reductions as NO_X needed to substitute for the VET Program, the District multiplied the 2004 NO_X/VOC ratio of 1.41 by the 2005 VOC emissions predicted to increase from closure of the VET Program, *i.e.*, 1.89 tpsd VOC, which totals 2.66 tpsd NO_X. The 2.66 tpsd of NO_X equivalent for VOC in 2005 is then added to the expected increase in 2005 of NO_X emissions due to closure of the VET Program, *i.e.*, 1.68 tpsd of NO_X in 2005, yielding the equivalent of 4.34 tpsd of NO_X, or 8,671 pounds per summer day (ppsd), which needs to be compensated by an all-NO_X control strategy substitution. As described earlier for the Quantifiable criterion, Kosmos' NO_X reductions remove 8,672 ppsd of NO_X from the air. Therefore, based on this conservative equivalency analysis, the proposed NO_X reductions from Kosmos are equivalent, in terms of reduced ozone formation benefits, to the VOC and NO_X reductions from the VET Program.

EPA believes that substituting NO_X reductions from Kosmos for both VOC and NO_X reductions from the VET Program continues to provide equivalent, if not better, air quality protection for Jefferson County due to significant contributions of VOCs from biogenic sources. Since both VOC and NO_X are needed under certain conditions to create ground-level ozone, and VOCs are abundant in areas with many trees and other vegetation such as in Kentucky, further reductions of NO_X limit the ability for ozone to form in this area. In addition, VOC and NO_X, the relevant pollutants controlled by the VET Program, are contributing precursors to the formation of PM2.5 and thus, EPA concludes that these equivalent reductions also demonstrate non-interference with the PM2.5 NAAQS.

TABLE 6.—TOTAL NO_X-EQUIVALENT INCREASE FROM VET PROGRAM CLOSURE

	2005w/2004 NO_X/VOC ratio	2005w/2005 NO_X/VOC ratio	2008w/2008 NO_X/VOC ratio	2012w/2012 NO_X/VOC ratio
VOC increase (tpsd)	1.89	1.89	1.80	1.65
VOC increase (ppsd)	3,780	3,780	3,600	3,300
VOC as NO_X (tpsd)	2.66	2.64	2.37	1.97
VOC as NO_X (ppsd)	5,311	5,283	4,742	3,945
NO_X increase (tpsd)	1.68	1.68	1.87	2.13
NO_X increase (ppsd)	3,360	3,360	3,740	4,260

TABLE 6.—TOTAL NO_X-EQUIVALENT INCREASE FROM VET PROGRAM CLOSURE—Continued

%	2005w/2004 NO_X/VOC ratio	2005w/2005 NO_X/VOC ratio	2008w/2008 NO_X/VOC ratio	2012w/2012 NO_X/VOC ratio
Total increase NO_X + VOC as NO_X (tpsd)	4.34	4.32	4.24	4.10
Total increase NO_X + VOC as NO_X (ppsd)	8,671	8,643	8,482	8,205

V. What Is EPA's Proposed Action?

EPA is proposing to move Regulation 8.01, ''Mobile Source Emissions Control Requirements,'' Regulation 8.02, ''Vehicle Emissions Testing Procedure,'' and Regulation 8.03, ''Commuter Vehicle Testing Requirements,'' from the active control measure portion of the Jefferson County portion of the Kentucky SIP. These regulations will be moved to the contingency measures section of the Kentucky portion of the Louisville 1-Hour Ozone Maintenance Plan. EPA is also proposing to approve a source-specific SIP revision amending the NO_X emission rate for Kosmos' cement kiln as adopted into the May 3, 2004, Board Order with the Kosmos Cement Company.

VI. Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this proposed action is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001). This proposed action merely proposes to approve state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule proposes to approve pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4).

This proposed rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have federalism implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely proposes to approve a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This proposed rule also is not subject to Executive Order 13045 ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because it is not economically significant.

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This proposed rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Volatile organic compounds.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: December 21, 2004.

J.I. Palmer Jr.,

Regional Administrator, Region 4.

[FR Doc. 04–28702 Filed 12–30–04; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 64

[CG Docket No. 02–278; DA 04–3835]

Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991

AGENCY: Federal Communications Commission.

ACTION: Petition for declaratory ruling; comments requested.

SUMMARY: This document seeks comment on a *Petition for Declaratory Ruling* filed by the Consumer Bankers Association (CBA), asking the Commission to preempt certain sections of the Indiana Revised Statutes and Indiana Administrative Code as it relates to interstate telephone calls.

DATES: Comments are due on or before February 2, 2005, and reply comments are due on or before February 17, 2005.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554. See **SUPPLEMENTARY INFORMATION** for further filing instructions.

FOR FURTHER INFORMATION CONTACT: Kelli Farmer, Consumer Policy Division, Consumer & Governmental Affairs Bureau, (202) 418–2512 (voice), *Kelli.Farmer@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's document, CG Docket No. 02–278, DA 04–3835, released December 7, 2004. On July 3, 2003, the Commission released a *Report and Order (2003 TCPA Order),* 68 FR 44144, July 25, 2003. In the 2003 TCPA Order, the Commission stated its belief that any state regulation of interstate telemarketing calls that differed from our rules under section 227 almost certainly would conflict with and frustrate the federal scheme and would be preempted. The Commission will consider any alleged conflicts between state and federal

requirements and the need for preemption on a case-by-case basis. Accordingly, any party that believes a state law is inconsistent with section 227 or our rules may seek a *Declaratory Ruling* from the Commission. When filing comments, please reference CG Docket No. 02–278. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings,* 63 FR 24121, May 1, 1998. Comments filed through the ECFS can be sent as an electronic file via the Internet to *http://www.fcc.gov/e-file/ecfs.html.* Generally, only one copy of an electronic submission must be filed. In completing the transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send e-mail to *ecfs@fcc.gov,* and should include the following words in the body of the message, ''get form <your e-mail address>.'' A sample form and directions will be sent in reply.

Parties who choose to file by paper must send an original and four (4) copies of each filing. Filings can be sent by hand or messenger delivery, by electronic media, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). The Commission's contractor, Natek, Inc., will receive hand-delivered or messenger-delivered paper filings or electronic media for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial and electronic media sent by overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW., Washington, DC 20554. All filings must be addressed to the Commission's Secretary, Marlene H. Dortch, Office of the Secretary, Federal Communications Commission, 445 12th Street, SW., Room TW–B204, Washington, DC 20554.

This proceeding shall be treated as a ''permit but disclose'' proceeding in accordance with the Commission's *ex parte* rules, 47 CFR 1.1200. Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substances of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required. *See* 47 CFR 1.1206(b). Other rules pertaining to oral and written *ex parte* presentations in permit-but-disclosed proceedings are set forth in section 1.1206(b) of the Commission's rules, 47 CFR 1.1206(b).

The full text of this document and copies of any subsequently filed documents in this matter will be available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554, (202) 418–0270. This document may be purchased from the Commission's duplicating contractor, Best Copy and Printing (BCPI), Inc., Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554. Customers may contact BCPI, Inc. at their Web site: *http://www.bcpiweb.com* or by calling 1–800–378–3160. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format) send an e-mail to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice) or (202) 418–0432 (TTY). This document can also be downloaded in Word or Portable Document Format (PDF) at *http://www.fcc.gov/cgb/policy.*

Synopsis

On November 19, 2004, Consumer Bankers Association (CBA) filed a *Petition for Declaratory Ruling* asking the Commission to preempt certain sections of the Indiana Revised Statutes and Indiana Administrative Code as it relates to interstate telephone calls. Specifically, CBA requests that the Commission preempt the Indiana laws to the extent they prohibit telemarketing calls to persons and entities with which the caller has an established business relationship as defined in the Commission's rules. CBA indicates that the Indiana laws provide that a telephone solicitor may not make a telephone sales call to a telephone number if that number appears on the state's do-not-call list. According to CBA, Indiana's prohibition on calls to numbers on the Indiana do-not-call list is subject to exceptions that partially overlap with, but are substantially narrower than the ''established business relationship'' (''EBR'') of the Commission's telemarketing rules. CBA contends that, unlike the Commission's EBR definition, the Indiana exceptions: (1) Do not include relationships based upon a consumer's past inquiry or application, during the three months preceding the call, regarding the party's products or services; (2) do not include calls to persons with whom the caller has engaged, within 18 months prior to the call, in a purchase or transaction as to which payment has been made or performance completed; and (3) do not expressly permit an EBR to extend to any affiliated entities that the consumer reasonably would expect to be included within that category.

Federal Communications Commission.

Jay Keithley,

Deputy Bureau Chief, Consumer & Governmental Affairs Bureau.

[FR Doc. 04–28417 Filed 12–30–04; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 64

[CG Docket No. 02–278; DA 04–3836]

Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991

AGENCY: Federal Communications Commission.

ACTION: Petition for declaratory ruling; comments requested.

SUMMARY: This document seeks comment on a *Petition for Declaratory Ruling* filed by the Consumer Bankers Association asking the Commission to preempt certain sections of the Wisconsin Statutes and Wisconsin Administrative Code as applied to interstate telephone calls.

DATES: Comments are due on or before February 2, 2005, and reply comments are due on or before February 17, 2005.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554. See supplementary information for further filing instructions.

FOR FURTHER INFORMATION CONTACT: Kelli Farmer, Consumer Policy Division, Consumer & Governmental Affairs Bureau, (202) 418–2512 (voice), *Kelli.Farmer@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's document, CG Docket No. 02–278, DA 04–3836, released December 7, 2004. On July 3, 2003, the Commission released a *Report and Order (2003 TCPA Order),* 68 FR 44144, July 25, 2003. In the *2003*

TCPA Order, the Commission stated its belief that any state regulation of interstate telemarketing calls that differed from our rules under section 227 almost certainly would conflict with and frustrate the federal scheme and would be preempted. The Commission will consider any alleged conflicts between state and federal requirements and the need for preemption on a case-by-case basis. Accordingly, any party that believes a state law is inconsistent with section 227 or our rules may seek a Declaratory Ruling from the Commission. When filing comments, please reference CG Docket No. 02–278. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings,* 63 FR 24121, May 1, 1998. Comments filed through the ECFS can be sent as an electronic file via the Internet to *http://www.fcc.gov/e-file/ecfs.html.* Generally, only one copy of an electronic submission must be filed. In completing the transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send e-mail to *ecfs@fcc.gov,* and should include the following words in the body of the message, ''get form <your e-mail address>.'' A sample form and directions will be sent in reply.

Parties who choose to file by paper must send an original and four (4) copies of each filing. Filings can be sent by hand or messenger delivery, by electronic media, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). The Commission's contractor, Natek, Inc., will receive hand-delivered or messenger-delivered paper filings or electronic media for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial and electronic media sent by overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW., Washington, DC 20554. All filings must be addressed to the Commission's Secretary, Marlene H. Dortch, Office of the Secretary, Federal Communications Commission, 445 12th Street, SW., Room TW–B204, Washington, DC 20554.

This proceeding shall be treated as a ''permit but disclose'' proceeding in accordance with the Commission's *ex parte* rules, 47 CFR 1.1200. Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substances of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required. *See* 47 CFR 1.1206(b). Other rules pertaining to oral and written ex parte presentations in permit-but-disclosed proceedings are set forth in section 1.1206(b) of the Commission's rules, 47 CFR 1.1206(b).

The full text of this document and copies of any subsequently filed documents in this matter will be available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554, (202) 418–0270. This document may be purchased from the Commission's duplicating contractor, Best Copy and Printing (BCPI), Inc., Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554. Customers may contact BCPI, Inc. at their Web site: *http://www.bcpiweb.com* or by calling 1–800–378–3160. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format) send an e-mail to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice) or (202) 418–0432 (TTY). This document can also be downloaded in Word or Portable Document Format (PDF) at *http://www.fcc.gov/cgb/policy.*

Synopsis

On November 19, 2004, Consumer Bankers Association (CBA) filed a *Petition for Declaratory Ruling* asking the Commission to preempt certain sections of the Wisconsin Statutes and Wisconsin Administrative Code as it relates to interstate telephone calls. CBA contends that the Wisconsin laws are significantly more restrictive than the Commission's telemarketing rules. More specifically, CBA argues that the Wisconsin laws are inconsistent with the Commission's regulations which permit telephone solicitation calls to persons with whom the caller has an ''established business relationship'' (EBR), even where the called party's number has been entered on the national do-not-call registry. CBA contends that the Wisconsin laws prohibit certain categories of calls that are within the scope of the Commission's EBR exception, including: (1) Calls made to residential subscribers who have made an inquiry or application regarding products or services, but have not expressly asked to be called in response to that inquiry or application; (2) calls made to residential subscribers who have engaged in a completed purchase or transaction with the caller; (3) calls made to existing customers for the purpose of offering additional or different products from those the seller already is providing to the customer; and (4) calls from an affiliate of the entity with whom the residential customer has an existing relationship. CBA explains that ''[t]hese inconsistencies between federal law and the Wisconsin statute subject CBA's members to 'multiple, conflicting regulations' in the area of interstate telemarketing. * * *'' Therefore, CBA requests a *Declaratory Ruling* that the identified provisions of Wisconsin's telemarketing statute and implementing regulations are preempted.

Federal Communications Commission.

Jay Keithley,

Deputy Bureau Chief, Consumer & Governmental Affairs Bureau.

[FR Doc. 04–28418 Filed 12–30–04; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 64

[CG Docket No. 02–278; DA 04–3837]

Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991

AGENCY: Federal Communications Commission.

ACTION: Petition for declaratory ruling; comments requested.

SUMMARY: This document seeks comment on a *Petition for Expedited Declaratory Ruling* filed by the National City Mortgage Co. (NCMC), asking the Commission to preempt a Florida telemarketing law, Florida Statute Section 501.059, prohibiting prerecorded messages without consent.

DATES: Comments are due on or before February 2, 2005, and reply comments are due on or before February 17, 2005.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554. See supplementary information for further filing instructions.

FOR FURTHER INFORMATION CONTACT: Kelli Farmer, Consumer Policy Division, Consumer & Governmental Affairs Bureau, (202) 418–2512 (voice), *Kelli.Farmer@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's document, CG Docket No. 02–278, DA 04–3837, released December 7, 2004. On July 3, 2003, the Commission released a *Report and Order (2003 TCPA Order), In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* adopted June 26, 2003, CG Docket No. 02–278, FCC 03–153; published at 68 FR 44144, July 25, 2003. In the *2003 TCPA Order,* the Commission stated its belief that any state regulation of interstate telemarketing calls that differed from our rules under section 227 almost certainly would conflict with and frustrate the federal scheme and would be preempted. The Commission will consider any alleged conflicts between state and federal requirements and the need for preemption on a case-by-case basis. Accordingly, any party that believes a state law is inconsistent with section 227 or our rules may seek a *Declaratory Ruling* from the Commission. When filing comments, please reference CG Docket No. 02–278. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings,* 63 FR 24121, May 1, 1998. Comments filed through the ECFS can be sent as an electronic file via the Internet to *http://www.fcc.gov/e-file/ecfs.html.* Generally, only one copy of an electronic submission must be filed. In completing the transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send e-mail to *ecfs@fcc.gov,* and should include the following words in the body of the message, ''get form <your e-mail address>.'' A sample form and directions will be sent in reply.

Parties who choose to file by paper must send an original and four (4) copies of each filing. Filings can be sent by hand or messenger delivery, by electronic media, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). The Commission's contractor, Natek, Inc., will receive hand-delivered or messenger-delivered paper filings or electronic media for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial and electronic media sent by overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW., Washington, DC 20554. All filings must be addressed to the Commission's Secretary, Marlene H. Dortch, Office of the Secretary, Federal Communications Commission, 445 12th Street, SW., Room TW–B204, Washington, DC 20554.

This proceeding shall be treated as a ''permit but disclose'' proceeding in accordance with the Commission's *ex parte* rules, 47 CFR 1.1200. Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substances of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required. *See* 47 CFR 1.1206(b). Other rules pertaining to oral and written *ex parte* presentations in permit-but-disclosed proceedings are set forth in section 1.1206(b) of the Commission's rules, 47 CFR 1.1206(b).

The full text of this document and copies of any subsequently filed documents in this matter will be available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554, (202) 418–0270. This document may be purchased from the Commission's duplicating contractor, Best Copy and Printing (BCPI), Inc., Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554. Customers may contact BCPI, Inc. at their Web site: *www.bcpiweb.com* or by calling 1–800–378–3160. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format) send an e-mail to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice) or (202) 418–0432 (TTY). This document can also be downloaded in Word or Portable Document Format (PDF) at *http://www.fcc.gov/cgb/policy.*

Synopsis

On November 22, 2004, National City Mortgage Company (NCMC) filed a *Petition for Expedited Declaratory Ruling* asking the Commission to preempt Florida law prohibiting prerecorded messages without consent. According to Petitioner, NCMC has received a notice from the Florida Department of Agriculture & Consumer Services which indicates that a prerecorded message call initiated by NCMC violated section 501.059(7)(a) of the Florida statute. NCMC explains that the Florida statute prohibits such prerecorded calls and makes no exception to this restriction for calls that are placed to persons with whom the caller has an established business relationship. In addition, NCMC explains that its calls into Florida are interstate calls. NCMC contends that the Florida statute is inconsistent with the Commission's rules that permit calls using prerecorded voice messages to any person with whom the caller has an established business relationship at the time the call is made; therefore, NCMC argues that the Florida statute should be preempted as applied to interstate calls. In addition, NCMC indicates that it has been informed by the Florida Department of Agriculture & Consumer Services that the complaint is still pending and might become the basis for further enforcement proceedings against NCMC. NCMC maintains that ''the State of Florida's apparent intention to enforce th[e] prohibition as to interstate calls subjects NCMC to the 'multiple, conflicting regulations' that the Commission has declared its intention to avoid.''

Federal Communications Commission.

Jay Keithley,

Deputy Bureau Chief, Consumer & Governmental Affairs Bureau.

[FR Doc. 04–28419 Filed 12–30–04; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 73 and 76

[MM Docket No. 00–167; FCC 04–221]

Broadcast Services; Children's Television; Cable Operators; Satellite Service Providers

AGENCY: Federal Communications Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Commission seeks comment on applying to Direct Broadcast Satellite (DBS) service providers its revised interpretation of the commercial time limits applicable to children's programming. Specifically, the Commission proposes to require that the display of Internet Web site addresses during DBS program material is permitted as within the time limits only if the Web site meets certain requirements, including the requirement that it offer a substantial amount of bona fide program-related or other noncommercial content and is not primarily intended for commercial purposes. In addition, the Commission proposes to apply to DBS its revised definition of ''commercial matter'' as including promotions of television programs or video programming services other than children's educational and informational programming. The Commission also seeks comment on how to tailor its rules to allow innovation in interactivity in children's television programming, while at the same time ensuring that parents can control what information their children can access.

DATES: Comments are due by March 1, 2005, and reply comments are due by April 1, 2005.

ADDRESSES: Federal Communications Commission, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Kim Matthews, Media Bureau, (202) 418–2120.

SUPPLEMENTARY INFORMATION: This is a summary of the Federal Communications Commission's *Further Notice of Proposed Rule Making* in MM Docket No. 00–167, FCC 04–221, adopted September 9, 2004, and released November 23, 2004. The complete text of this document is available for inspection and copying during normal business hours in the FCC Reference Center, 445 12th Street, SW., Washington, DC 20554. The complete text may be purchased from the Commission's copy contractor, Qualex International, 445 12th Street, SW., Room CY–B402, Washington, DC 20554. The full text may also be downloaded at: *http://www.fcc.gov.* To request materials in accessible formats for people with disabilities (braille, large print, electronic file, audio format), send an e-mail to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

Paperwork Reduction Act: This document contains proposed and modified information collections subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. It will be submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the PRA. OMB, the general public, and other Federal agencies will be invited to comment on the modified and proposed information collection requirements contained in this proceeding.

Summary of the Further Notice of Proposed Rule Making

1. In the final rule document in this proceeding, published elsewhere in the same issue of this **Federal Register**, we resolved a number of issues raised in the Notice of Proposed Rulemaking (65 FR 66951–01, November 8, 2000) regarding the obligation of television broadcasters to protect and serve children in their audience. In the final rule document, we concluded that, for the time being, we will not prohibit the appearance of direct, interactive, links to commercial Internet sites in children's programming, as this technology is currently not being used in children's programming. Nonetheless, we are aware that the inclusion of interactive technology in television programming is on the horizon. We encourage broadcasters to develop interactive services that enhance the educational value of children's programming. With the benefits of interactivity, however, come potential risks that children will be exposed to additional commercial influences. Accordingly, we seek comment on how to tailor our rules to allow innovation in interactivity in children's television programming, while at the same time ensuring that parents can control what information their children can access.

2. We tentatively conclude that we should prohibit interactivity during children's programming that connects viewers to commercial matter unless parents ''opt in'' to such services. We seek comment on how such a rule could be implemented technologically. We also seek comment on how we would implement such a rule in terms of the statutory limits on commercial time. In particular, we note that the time spent accessing the Internet or other interactive material during a program is not limited to the time that a link is displayed on the screen. For the same reason, we seek comment as to how such a rule would apply to commercials, given that interactive elements can cause a commercial to last much longer than a 30-second or 15-second spot. Finally, we seek comment on whether to change how we define commercial matter in this context.

3. We also concluded in the Report and Order in this proceeding that we will revise our definition of ''commercial matter'' to include promotions of television programs or video programming services other than children's educational and informational programming. We stated that we will apply this revised definition to television licensees and cable operators. We tentatively conclude that we should also amend Part 25 of the Commission's rules to apply this revised definition to Direct Broadcast Satellite (''DBS'') service providers, and seek comment on this tentative conclusion. In addition, in the Report and Order we interpreted the CTA commercial time limits to require that, with respect to programs directed to children ages 12 and under, the display of Internet Web site addresses during program material is permitted as within the CTA limitations only if the Web site: (1) Offers a substantial amount of bona fide program-related or other noncommercial content; (2) is not primarily intended for commercial purposes, including either e-commerce or advertising; (3) the Web site's home page and other menu pages are clearly labeled to distinguish the noncommercial from the commercial sections; and (4) the page of the Web site to which viewers are directed by the Web site address is not used for e-commerce, advertising, or other commercial purposes (*e.g.*, contains no links labeled ''store'' and no links to another page with commercial material). We propose to apply these restrictions on the displaying of commercial Web site information to DBS and require DBS providers to maintain records sufficient to verify compliance with the commercial limits requirements and to make such records available to the public. We believe that it is appropriate to require that children in DBS households receive the same protection from excessive commercialism on television as children in cable or over-the-air television households. We do not believe that compliance with these rules will be burdensome as many of the programming services carried by DBS providers are the same as are carried by cable systems around the country, which must comply with the revised commercial limits rules adopted in our decision today.

Administrative Matters

4. This is a permit-but-disclose notice and comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda

period, provided that they are disclosed as provided in the Commission's Rules. See generally 47 CFR 1.1202, 1.1203, and 1.1206(a).

5. Pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments on or before March 1, 2005, and reply comments on or before April 1, 2005. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings,* 63 FR 24121 (1998). Documents filed through the ECFS can be sent as an electronic file via the Internet to *http://www.fcc.gov/e-file/ecfs.html.* Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers are referenced in the caption of the comments, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to *ecfs@fcc.gov,* and should include the following words in the body of the message, ''get form <your e-mail address>.'' A sample form and directions will be sent in reply. Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appear in the caption of the comment, commenters must submit two additional copies for each additional docket or rulemaking number. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). The Commission's contractor, Vistronix, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW., Washington, DC 20554. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

6. This Further Notice of Proposed Rulemaking may contain either proposed or modified information collections subject to the Paperwork Reduction Act of 1995. As part of our continuing effort to reduce paperwork burdens, we invite OMB, the general public, and other Federal agencies to take this opportunity to comment on the information collections contained in this Further Notice, as required by the Paperwork Reduction Act of 1995. Public and agency comments are due at the same time as other comments on the Further Notice. Comments should address: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) ways to enhance the quality, utility, and clarity of the information collected; and (c) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Cathy Williams, Federal Communications Commission, 445 Twelfth Street, SW., Room 1–C823, Washington, DC 20554, or via the Internet to *Cathy.Williams@fcc.gov* and to Kristy L. LaLonde, OMB Desk Officer, 10234 NEOB, 725 17th Street, NW., Washington, DC 20503 or via the Internet to *Kristy L. LaLonde @omb.eop.gov,* or via fax at 202–395–5167.

7. As required by the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities of the proposals addressed in this Further Notice of Proposed Rulemaking. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines for comments on the Further Notice, and they should have a separate and distinct heading designating them as responses to the IRFA.

8. To request materials in accessible formats for people with disabilities (braille, large print, electronic file, audio format), send an e-mail to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY). This document can also be downloaded in Word and Portable Document Format (PDF) at: *http://www.fcc.gov.*

9. For additional information on this proceeding, please contact Kim Matthews, Policy Division, Media Bureau at (202) 418–2154.

Initial Regulatory Flexibility Analysis

As required by the Regulatory Flexibility Act of 1980, as amended (''RFA''), the Commission has prepared this Initial Regulatory Flexibility Analysis (''IRFA'') of the possible significant economic impact on small entities by the policies and rules proposed in this Further Notice of Proposed Rulemaking (''NPRM''). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the NPRM. The Commission will send a copy of the Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration. In addition, the Notice and IRFA (or summaries thereof) will be published in the **Federal Register**.

I. Need for and Objectives of the Proposed Rules

Our goal in commencing this proceeding is to seek comment on two issues: (1) Whether and how we should limit the use of interactivity for commercial purposes in children's television programming; and (2) whether we should apply to Direct Broadcast Satellite service providers the same revised definition of ''commercial matter'' adopted in the Report and Order.

We seek comment in the Notice on the tentative conclusion that we should prohibit interactivity during children's programming that connects viewers to commercial matter unless parents ''opt in'' to such services. We seek comment on how such a rule could be implemented technologically. We also seek comment on how we would implement such a rule in terms of the statutory limits on commercial time.

We concluded in the Report and Order that we will revise our definition of ''commercial matter'' to include promotions of television programs or video programming services other than children's educational and informational programming. We stated that we will apply this revised definition to television licensees and cable operators. We tentatively conclude in the Notice that we should also amend

Part 25 of the Commission's rules to apply this revised definition to Direct Broadcast Satellite service providers, and seek comment on this tentative conclusion.

In addition, the Report and Order interprets the CTA commercial time limits to require that, with respect to programs directed to children ages 12 and under, the display of Internet Web site addresses during program material is permitted as within the CTA limitations only if the Web site: (1) Offers a substantial amount of bona fide program-related or other noncommercial content; (2) is not primarily intended for commercial purposes, including either e-commerce or advertising; (3) the Web site's home page and other menu pages are clearly labeled to distinguish the noncommercial from the commercial sections; and (4) the page of the Web site to which viewers are directed by the Web site address is not used for e-commerce, advertising, or other commercial purposes (*e.g.*, contains no links labeled ''store'' and no links to another page with commercial material). The Report and Order applies this restriction to broadcasters and cable operators. We propose in the NPRM to apply this restriction to DBS. In addition, we propose to require DBS providers to maintain records sufficient to verify compliance with the commercial limits in children's programming and to make such records available to the public.

II. Legal Basis

The authority for the action proposed in this rulemaking is contained in Sections 4(i) & (j), 303, 303a, 303b, 307, 309 and 336 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i) & (j), 303, 303a, 303b, 307, 309 and 336.

III. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the proposed rules, if adopted. The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. A small business concern is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (''SBA'').

In this context, the application of the statutory definition to television stations is of concern. An element of the definition of ''small business'' is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimates that follow of small businesses to which rules may apply do not exclude any television station from the definition of a small business on this basis and therefore might be over-inclusive.

An additional element of the definition of ''small business'' is that the entity must be independently owned and operated. It is difficult at times to assess these criteria in the context of media entities and our estimates of small businesses might therefore be over inclusive.

Television Broadcasting. The Small Business Administration defines a television broadcasting station that has no more than $12 million in annual receipts as a small business. Business concerns included in this industry are those ''primarily engaged in broadcasting images together with sound.'' According to Commission staff review of the BIA Publications, Inc. Master Access Television Analyzer Database as of May 16, 2003, about 814 of the 1,220 commercial television stations in the United States have revenues of $12 million or less. We note, however, that, in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies.

In addition, an element of the definition of ''small business'' is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply do not exclude any television station from the definition of a small business on this basis and are therefore over-inclusive to that extent. Also as noted, an additional element of the definition of ''small business'' is that the entity must be independently owned and operated. We note that it is difficult at times to assess these criteria in the context of media entities and our estimates of small businesses to which they apply may be over-inclusive to this extent.

There are also 380 non-commercial TV stations in the BIA database. Since these stations do not receive advertising revenue, there are no revenue estimates for these stations. We believe that virtually all of these stations would be considered ''small businesses'' given that they are generally owned by non-commercial entities including local schools and governments and, for the most part, rely on public donations and funding.

Cable and Other Program Distribution. The SBA has developed a small business size standard for cable and other program distribution services, which includes all such companies generating $12.5 million or less in revenue annually. This category includes, among others, cable operators, direct broadcast satellite (''DBS'') services, home satellite dish (''HSD'') services, multipoint distribution services (''MDS''), multichannel multipoint distribution service (''MMDS''), Instructional Television Fixed Service (''ITFS''), local multipoint distribution service (''LMDS''), satellite master antenna television (''SMATV'') systems, and open video systems (''OVS''). According to Census Bureau data, there are 1,311 total cable and other pay television service firms that operate throughout the year of which 1,180 have less than $10 million in revenue. We address below each service individually to provide a more precise estimate of small entities.

Cable Operators. The SBA has developed a small business size standard for cable and other program distribution services, which includes all such companies generating $12.5 million or less in revenue annually. The Commission has developed, with SBA's approval, our own definition of a small cable system operator for the purposes of rate regulation. Under the Commission's rules, a ''small cable company'' is one serving fewer than 400,000 subscribers nationwide. We last estimated that there were 1,439 cable operators that qualified as small cable companies. Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, we estimate that there are fewer than 1,439 small entity cable system operators that may be affected by the decisions and rules in this Report and Order.

The Communications Act, as amended, also contains a size standard for a small cable system operator, which is ''a cable operator that, directly or

through an affiliate, serves in the aggregate fewer than 1% of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000.'' The Commission has determined that there are 68,500,000 subscribers in the United States. Therefore, an operator serving fewer than 685,000 subscribers shall be deemed a small operator if its annual revenues, when combined with the total annual revenues of all of its affiliates, do not exceed $250 million in the aggregate. Based on available data, we find that the number of cable operators serving 685,000 subscribers or less totals approximately 1,450. Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed $250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

Direct Broadcast Satellite (''DBS'') Service. Because DBS provides subscription services, DBS falls within the SBA-recognized definition of Cable and Other Program Distribution services. This definition provides that a small entity is one with $12.5 million or less in annual receipts. There are four licensees of DBS services under Part 100 of the Commission's Rules. Three of those licensees are currently operational. Two of the licensees that are operational have annual revenues that may be in excess of the threshold for a small business. The Commission, however, does not collect annual revenue data for DBS and, therefore, is unable to ascertain the number of small DBS licensees that could be impacted by these proposed rules. DBS service requires a great investment of capital for operation, and we acknowledge, despite the absence of specific data on this point, that there are entrants in this field that may not yet have generated $12.5 million in annual receipts, and therefore may be categorized as a small business, if independently owned and operated. Therefore, we will assume all four licensees are small, for the purpose of this analysis.

Electronics Equipment Manufacturers. Rules adopted in this proceeding could apply to manufacturers of DTV receiving equipment and other types of consumer electronics equipment. The SBA has developed definitions of small entity for manufacturers of audio and video equipment as well as radio and television broadcasting and wireless communications equipment. These categories both include all such companies employing 750 or fewer employees. The Commission has not developed a definition of small entities applicable to manufacturers of electronic equipment used by consumers, as compared to industrial use by television licensees and related businesses. Therefore, we will utilize the SBA definitions applicable to manufacturers of audio and visual equipment and radio and television broadcasting and wireless communications equipment, since these are the two closest NAICS Codes applicable to the consumer electronics equipment manufacturing industry. However, these NAICS categories are broad and specific figures are not available as to how many of these establishments manufacture consumer equipment. According to the SBA's regulations, an audio and visual equipment manufacturer must have 750 or fewer employees in order to qualify as a small business concern. Census Bureau data indicates that there are 554 U.S. establishments that manufacture audio and visual equipment, and that 542 of these establishments have fewer than 500 employees and would be classified as small entities. The remaining 12 establishments have 500 or more employees; however, we are unable to determine how many of those have fewer than 750 employees and therefore, also qualify as small entities under the SBA definition. Under the SBA's regulations, a radio and television broadcasting and wireless communications equipment manufacturer must also have 750 or fewer employees in order to qualify as a small business concern. Census Bureau data indicates that there 1,215 U.S. establishments that manufacture radio and television broadcasting and wireless communications equipment, and that 1,150 of these establishments have fewer than 500 employees and would be classified as small entities. The remaining 65 establishments have 500 or more employees; however, we are unable to determine how many of those have fewer than 750 employees and therefore, also qualify as small entities under the SBA definition. We therefore conclude that there are no more than 542 small manufacturers of audio and visual electronics equipment and no more than 1,150 small manufacturers of radio and television broadcasting and wireless communications equipment for consumer/household use.

Computer Manufacturers. The Commission has not developed a definition of small entities applicable to computer manufacturers. Therefore, we will utilize the SBA definition of electronic computers manufacturing. According to SBA regulations, a computer manufacturer must have 1,000 or fewer employees in order to qualify as a small entity. Census Bureau data indicates that there are 563 firms that manufacture electronic computers and of those, 544 have fewer than 1,000 employees and qualify as small entities. The remaining 19 firms have 1,000 or more employees. We conclude that there are approximately 544 small computer manufacturers.

IV. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements

At this time, we do not expect that the proposed rules would impose significant additional reporting or recordkeeping requirements. While the requirements proposed in the Notice would have an impact on Direct Broadcast Satellite providers and others, we do not expect the impact to be significant in terms of time or expense to comply. At this time, we expect the requirements to be the same for large and small entities. We seek comment on whether others perceive a need for less extensive recordkeeping or compliance requirements for small entities.

V. Steps Taken to Minimize Significant Impact on Small Entities, and Significant Alternatives Considered

The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.

The proposals in the NPRM would apply equally to large and small entities. We welcome comment on modifications of the proposals if such modifications might assist small entities and especially if such are based on evidence of potential differential impact.

VI. Federal Rules Which Duplicate, Overlap, or Conflict With the Commission's Proposals

None.

List of Subjects

47 CFR Part 73

Television.

47 CFR Part 76

Cable television.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 04–28174 Filed 12–30–04; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[I.D. 122304D]

RIN 0648–AN25

Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Monkfish Fishery; Amendment 2 to the Monkfish Fishery Management Plan

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of availability of a fishery management plan amendment; request for comments.

SUMMARY: NMFS announces that the New England Fishery Management Council (NEFMC) and the Mid-Atlantic Fishery Management Council (MAFMC) have submitted Amendment 2 to the Monkfish Fishery Management Plan (FMP) (Amendment 2) incorporating the draft Final Supplemental Environmental Impact Statement (FSEIS), Regulatory Impact Review (RIR), and the Initial Regulatory Flexibility Analysis (IRFA), for Secretarial review and is requesting comments from the public. Amendment 2 was developed to address essential fish habitat (EFH) and bycatch issues, and to revise the FMP to address several issues raised during the public scoping process. The intent of this action is to provide efficient management of the monkfish fishery and to meet conservation objectives.

DATES: Comments must be received on or before March 3, 2005.

ADDRESSES: Written comments on the proposed interim rule may be submitted by any of the following methods:

• E-mail: E-mail comments may be submitted to *http://monkamend2@noaa.gov*. Include in the subject line the following: ''Comments on the Monkfish Amendment 2.''

• Federal e-Rulemaking Portal: *http://www.regulations.gov*.

• Mail: Comments submitted by mail should be sent to Patricia A. Kurkul, Regional Administrator, Northeast Region, NMFS, One Blackburn Drive, Gloucester, MA 01930–2298. Mark the outside of the envelope ''Comments on the Monkfish Amendment 2.''

• Facsimile (fax): Comments submitted by fax should be faxed to (978) 281–9135.

Copies of Amendment 2, the FSEIS, RIR, and IRFA are available from Paul J. Howard, Executive Director, New England Fishery Management Council, 50 Water Street, Newburyport, MA 01950. These documents are also available online at *http://www.nefmc.org*.

FOR FURTHER INFORMATION CONTACT: Allison R. Ferreira, Fishery Policy Analyst, (978) 281–9103; fax (978) 281–9135; e-mail: *allison.ferreira@noaa.gov*.

SUPPLEMENTARY INFORMATION: A notice of availability for the Draft Supplemental Environmental Impact Statement (DSEIS) for Amendment 2 was published in the **Federal Register** on April 30, 2004 (69 FR 23571), with public comment accepted through July 28, 2004. After considering all comments on the DSEIS, the NEFMC and MAFMC adopted the final measures to be included in Amendment 2 at their respective September 14–16, 2004, and October 4–6, 2004, meetings, and voted to submit the Amendment 2 document, including the FSEIS, to NMFS.

The NEFMC and MAFMC developed Amendment 2 to address a number of issues that arose out of the implementation of the original FMP, as well as issues that were identified during public scoping. Issues arising from the original FMP include: (1) The displacement of vessels from their established monkfish fisheries due to restrictive trip limits; (2) unattainable permit qualification criteria for vessels in the southern end of the range of the fishery; (3) discards (bycatch) of monkfish due to regulations (i.e., minimum size restrictions and incidental catch limits); and (4) deficiencies in meeting Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) requirements pertaining to protection of EFH in accordance with the Joint Stipulation and Order resulting from the legal challenge American Oceans Campaign, et al. v. Daley. Issues arising from public scoping include: (1) Deficiencies in meeting Magnuson-Stevens Act requirements, including preventing overfishing and rebuilding overfished stocks; (2) a need to improve monkfish data collection and research; (3) the need to establish a North Atlantic Fisheries Organization (NAFO) exemption program for monkfish; multiple vessel baseline specifications for limited access monkfish vessels; (4) a need to update environmental documents describing the impact of the FMP; and, (5) a need to reduce FMP complexity where possible.

Amendment 2 evaluates and includes the following measures to minimize the adverse effects of fishing on EFH: A maximum disc diameter of 6 inches (15.2 cm) for trawl gear vessels fishing in the Southern Fishery Management Area (SFMA); and closure of two deep-sea canyon areas to all gears when fishing under the monkfish day-at-sea (DAS) program. Amendment 2 also proposes the following management measures: (1) A new limited access permit for qualified vessels fishing south of 38o 20' N. lat.; (2) an offshore trawl fishery in the SFMA; establishment of a research DAS set-aside program; (3) an exemption program for vessels fishing outside of the Exclusive Economic Zone; (4) adjustments to the incidental monkfish catch limits; a decrease in the minimum monkfish size in the SFMA; (5) removal of the 20–day block requirement; revisions to the monkfish baseline provisions; and (6) additions to the frameworable measures.

Public comments are being solicited on Amendment 2 and its incorporated documents through the end of the comment period stated in this notice of availability. A proposed rule that would implement Amendment 2 may be published in the **Federal Register** for public comment, following NMFS's evaluation of the proposed rule under the procedures of the Magnuson-Stevens Act. Public comments on the proposed rule must be received by the end of the comment period provided in this notice of availability of Amendment 2 to be considered in the approval/disapproval decision on the amendment. All comments received by March 3, 2005, whether specifically directed to Amendment 2 or the proposed rule, will be considered in the approval/disapproval decision on Amendment 2. Comments received after that date will not be considered in the decision to approve or disapprove Amendment 2. Therefore, to be considered, comments must be received by close of business on the last date of the comment period, March 3, 2005; that does not mean postmarked or otherwise transmitted by that date.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: December 27, 2004.

Alan D. Risenhoover,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 04–28738 Filed 12–30–04; 8:45 am]

BILLING CODE 3510–22–S

Notices

Federal Register
Vol. 70, No. 1
Monday, January 3, 2005

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. 04–076–3]

Monsanto Co.; Availability of Determination of Nonregulated Status for Cotton Genetically Engineered for Tolerance to the Herbicide Glyphosate

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice.

SUMMARY: We are advising the public of our determination that the Monsanto Company cotton designated as MON 88913, which has been genetically engineered for tolerance to the herbicide glyphosate, is no longer considered a regulated article under our regulations governing the introduction of certain genetically engineered organisms. Our determination is based on our evaluation of data submitted by Monsanto Company in its petition for a determination of non-regulated status, our analysis of other scientific data, and comments received from the public in response to a previous notice. This notice also announces the availability of our written determination and our finding of no significant impact.

DATES: *Effective Date:* December 20, 2004.

ADDRESSES: You may read the determination, the environmental assessment and finding of no significant impact, the petition for a determination of nonregulated status submitted by Monsanto Company, and all comments received on the petition and the environmental assessment in our reading room. The reading room is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue, SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690–2817 before coming.

You may view APHIS documents published in the **Federal Register** and related information, including the names of groups and individuals who have commented on APHIS dockets, on the Internet at *http://www.aphis.usda.gov/ppd/rad/webrepor.html*.

FOR FURTHER INFORMATION CONTACT: Mr. Michael Blanchette, Biotechnology Regulatory Services, APHIS, 4700 River Road Unit 147, Riverdale, MD 20737–1236; (301) 734–5141. To obtain a copy of the determination or environmental assessment and finding of no significant impact, contact Ms. Terry Hampton at (301) 734–5715; e-mail: *Terry.A.Hampton@aphis.usda.gov*. The petition and environmental assessment are also available on the Internet at *http://www.aphis.usda.gov/brs/aphisdocs/04_08601p.pdf* and *http://www.aphis.usda.gov/brs/aphisdocs/04_08601p_ea.pdf*. The determination and the final environmental assessment and finding of no significant impact are available on the Internet at *http://www.aphis.usda.gov/brs/aphisdocs/04_08601p_com.pdf*.

SUPPLEMENTARY INFORMATION:

Background

The regulations in 7 CFR part 340, ''Introduction of Organisms and Products Altered or Produced Through Genetic Engineering Which Are Plant Pests or Which There Is Reason to Believe Are Plant Pests,'' regulate, among other things, the introduction (importation, interstate movement, or release into the environment) of organisms and products altered or produced through genetic engineering that are plant pests or that there is reason to believe are plant pests. Such genetically engineered organisms and products are considered ''regulated articles.''

The regulations in § 340.6(a) provide that any person may submit a petition to the Animal and Plant Health Inspection Service (APHIS) seeking a determination that an article should not be regulated under 7 CFR part 340. Paragraphs (b) and (c) of § 340.6 describe the form that a petition for a determination of nonregulated status must take and the information that must be included in the petition.

On March 26, 2004, APHIS received a petition from Monsanto Company of St. Louis, MO (Monsanto), requesting a determination of nonregulated status under 7 CFR part 340 for cotton (*Gossypium hirsutum* L.) designated as MON 88913, which has been genetically engineered for tolerance to the herbicide glyphosate. The Monsanto petition states that the subject cotton should not be regulated by APHIS because it does not present a plant pest risk.

On October 4, 2004, APHIS published a notice in the **Federal Register** (69 FR 59181–59182, Docket No. 04–076–1) announcing that the Monsanto petition and an environmental assessment (EA) were available for public review. The notice also discussed the role of APHIS, the Environmental Protection Agency, and the Food and Drug Administration in regulating the subject cotton and food products developed from it. In a subsequent notice published in the **Federal Register** on November 24, 2004 (69 FR 68301–68302, Docket No. 04–076–2), APHIS announced the availability of an addendum to the Monsanto petition.

APHIS received three comments on the petition and the EA during the 60-day comment period, which ended December 4, 2004. The comments were from a university professor, a trade organization, and a private individual. Two of the commenters supported nonregulated status for MON 8891, while the third commenter opposed it. APHIS has provided a response to these comments as an attachment to the finding of no significant impact (FONSI). The EA and FONSI are available as indicated under **FOR FURTHER INFORMATION CONTACT**.

MON 88913 has been genetically engineered to express a 5-enolpyruvyshikimate-3-phosphate synthase protein from *Agrobacterium* sp. strain CP4 (CP4 EPSPS), which confers tolerance to the herbicide glyphosate. Expression of the added genes is controlled in part by gene sequences derived from the plant pathogens figwort mosaic virus and cauliflower mosaic virus. The *Agrobacterium tumefaciens* transformation method was used to transfer the added genes into the recipient upland cotton variety Coker 312.

MON 88913 cotton has been considered a regulated article under the

regulations in 7 CFR part 340 because it contains gene sequences from plant pathogens. In the process of reviewing the notifications for field trials of the subject cotton, APHIS determined that the vectors and other elements were disarmed and that the trials, which were conducted under conditions of reproductive and physical confinement or isolation, would not present a risk of plant pest introduction or dissemination.

Determination

Based on its analysis of the data submitted by Monsanto Company, a review of other scientific data, field tests of the subject cotton, and comments submitted by the public, APHIS has determined that MON 88913 cotton: (1) Exhibits no plant pathogenic properties; (2) is no more likely to become weedy than the non-transgenic parental line or other cultivated cotton; (3) is unlikely to increase the weediness potential for any other cultivated or wild species with which it can interbreed; (4) will not cause damage to raw or processed agricultural commodities; (5) will not harm threatened or endangered species or organisms that are beneficial to agriculture; and (6) should not reduce the ability to control pests and weeds in cotton or other crops. Therefore, APHIS has concluded that the subject cotton and any progeny derived from hybrid crosses with other non-transformed cotton varieties will be as safe to grow as cotton in traditional breeding programs that is not subject to regulation under 7 CFR part 340.

The effect of this determination is that Monsanto Company's MON 88913 cotton is no longer considered a regulated article under APHIS' regulations in 7 CFR part 340. Therefore, the requirements pertaining to regulated articles under those regulations no longer apply to the subject cotton or its progeny. However, importation of MON 88913 cotton and seeds capable of propagation are still subject to the restrictions found in APHIS' foreign quarantine notices in 7 CFR part 319 and imported seed regulations in 7 CFR part 361.

National Environmental Policy Act

An EA was prepared to examine any potential environmental impacts associated with the proposed determination of non-regulated status for the subject cotton event. The EA was prepared in accordance with: (1) The National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 *et seq.*), (2) regulations of the Council on Environmental Quality for implementing the procedural provisions of NEPA (40 CFR parts 1500–1508), (3) USDA regulations implementing NEPA (7 CFR part 1b), and (4) APHIS' NEPA Implementing Procedures (7 CFR part 372). Based on that EA, APHIS has reached a FONSI with regard to the determination that Monsanto MON 88913 cotton and lines developed from it are no longer regulated articles under its regulations in 7 CFR part 340. Copies of the EA and FONSI are available as indicated in the **FOR FURTHER INFORMATION CONTACT** section of this notice.

Done in Washington, DC, this 27th day of December 2004.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. E4–3908 Filed 12–30–04; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Forest Service

Notice of Availability; County Line Vegetation Management Project Draft, Environmental Impact Statement

AGENCY: Forest Service, Rio Grande National Forest.

ACTION: Notice of availability and public hearings.

SUMMARY: The United States Department of Agriculture (USDA) Forest Service (USFS), Rio Grande National forest (RGNF) announces the availability of the County Line Vegetation Management Project Draft Environmental Impact Statement (EIS). The Draft EIS was prepared in accordance with the Council on Environmental Quality's National Environmental Policy Act (NEPA) Implementing Regulations (40 CFR Parts 1500–1508). The EIS analyzes the environmental impacts of a proposal to manage a spruce beetle infestation by performing up to 715 acres of sanitation/salvage harvest and up to 841 acres of preventative thinning. Timber harvest activities could produce from 22 to 29 MMBF of spruce sawtimber. The action alternatives propose to realign 0.3 miles of system road, to reconstruct from 10.7 to 15.6 miles of system roads to construct 2.3 miles of temporary roads, and to close up to 2.3 miles of open system road and convert it to a non-motorized trail. Three alternatives are considered: (A) The No Action Alternative; (B) the Proposed Action (Sanitation/salvage and preventative thinning); and (C) Sanitation/Salvage.

DATES: USFS invites Federal agencies, state and local governments, Native American tribes, and the public to comment on the Draft EIS. The comment period extends from the publication of this Notice of Availability until February 07, 2005. Written comments must be submitted by February 07, 2005. Comments submitted after that date will be considered to the extent practicable. The USFS will consider the comments in the preparation of the Final EIS. Public meetings to present information and receive written comments on the Draft EIS are not planned at this time.

The following Web site may be accessed for additional information: *http://www.fs.fed.us/r2/riogrande/.*

ADDRESSES: Send written comments on the Draft EIS or requests for copies of the Draft EIS to Mr. John Murphy, Interdisciplinary Team Leader, USDA–USFS, Rio Grande National Forest, Public Lands Center, 1803 West Highway 160, Monte Vista, CO 81144. Electronic mail (e-mail) may be sent to *comments-rocky-mountain-rio-grande@fs.fed.us* and faxes may be sent to (719) 852–6250.

A copy of the Draft EIS will be available on the Internet at: *http://www.fs.fed.us/r2/riogrande/.*

FOR FURTHER INFORMATION CONTACT: Contact Mr. John Murphy, Interdisciplinary Team Leader, USDA–USFS, Public Lands Center (719) 852–6221. Refer to **SUPPLEMENTARY INFORMATION** regarding public disclosure of submitted comment information.

SUPPLEMENTARY INFORMATION: The Rio Grande National Forest is comprised of 1.86 million acres located in southwestern Colorado. Denver, Colorado, is approximately 300 miles to the north of the RGNF, and Albuquerque, New Mexico, is approximately 270 miles to the south. The Continental Divide runs for 236 miles along most of the western border of the RGNF. The County Line analysis Area is located about 15 miles north-east of Chama, New Mexico on lands administered by the RGNF.

The spruce beetle (Dendroctonus rufipennis) is the most significant cause of mortality of mature Engelmann spruce (Picea engelmannii) stands. Large-scale spruce beetle infestations in excess of 100,000 acres have occurred over the last 25 years in North America from Alaska to Arizona.

The scope of spruce beetle outbreaks can be significant, at times killing up to 80% or more of the mature spruce trees within a watershed.

Many areas of the Rio Grande National Forest are currently experiencing severe infestations of spruce beetle, including the County

Line Analysis Area. Endemic spruce beetle populations usually live in windthrown trees but as populations increase they may enter susceptible, large diameter trees. Spruce stands are highly susceptible to spruce beetle when they are on highly productive sites, have an average diameter at breast height greater than 16 inches, have a basal area greater than 150 square feet per acre, and are stands that are predominantly spruce.

The Count Line area contains these types of stands which are most susceptible to spruce beetle infestation. Significant spruce beetle activity was first observed in the County Line Analysis Area during the winter of 2003. Monitoring since then has shown spruce beetle infestations spreading through many of the stands in the analysis area at levels, which are resulting in significant spruce mortality. While spruce beetle epidemics cannot be stopped, stand management can reduce the adverse effects of beetle infestations and the resulting tree mortality.

The responsible Official is the forest Supervisor, Rio Grande National Forest, 1803 West Highway 160, Monte Vista, CO 81132. The NEPA decision to be made by the USFS official is whether to perform sanitation/salvage treatments to heavily impacted stands, whether to perform preventive thinning to susceptible stands, and whether to close 2.1 miles of open system road and convert it to a non-motorized trail.

No Action: The No Action Alternative is the current USFS management situation. Under this alternative, USFS would not treat stands currently infested with spruce beetle, would not perform preventative thing in susceptible stands, and would not close 2.1 miles of open system road and convert it to a non-motorized trail.

Proposed Action: This alternative emphasizes forest health restoration activities by managing spruce stands to create conditions less favorable to the spread of spruce beetle, reducing the spruce beetle population in the analysis area. This alternative proposes to thin 715 acres of spruce-fir and to conduct sanitation/salvage harvest on 841 acres. Trap trees would be utilized in the preventative thinning areas. Following timber harvest activities 693 acres would be planted to spruce. This alternative requires 5.1 miles of pre-haul maintenance, 1.8 miles of dust abatement, 15.6 miles of road reconstruction, 0.3 miles of road re-alignment, and 2.1 miles of road closure and conversion to a non-motorized trail. From 24 to 29 MMBF of spruce sawtimber would be harvested under this alternative.

Alternative C: This alternative addresses forest health restoration activities by reducing the spruce beetle population in the analysis area. This alternative proposes to conduct sanitation/salvage harvest on 841 acres. Following timber harvest activities 693 acres would be planted to spruce. This alternative requires 5.1 miles of pre-haul maintenance, 1.8 miles of dust abatement, 10.7 miles of road reconstruction and 0.3 miles of road re-alignment. From 22 to 25 MMBF of spruce sawtimber would be harvested under this alternative.

Comments Requested

This Notice of Availabilitry initiates the public comment process that guides the development of the Final EIS. The USFS invites written comments and suggestions on the proposed action and alternatives, including any issues to consider, as well as any concerns relevant to the analysis. In order to be most useful, comments should be received by February 07, 2005. Comments received in response to this notice, including names and addresses of those who comment, will be considered part of the public record on this Proposed Action and will be available for public inspection. If you wish to withhold your name or street address from public review or from disclosure under the Freedom of Information Act (FOIA), you must state this prominently at the beginning of your written comment. Such requests will be honored to the extent allowed by law, but persons requesting such confidentiality should be aware that under the FOIA, confidentiality may be granted in only very limited circumstances, such as to protect trade secrets. The USFS will inform the requester of the agency's decision regarding the request for confidentiality, and where the request is denied, the agency will return the submission and notify the requester that the comments may be resubmitted with or without name and address within a specified number of days. All submissions from organizations and business, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be available for public inspection in their entirety. Comments submitted anonymously will be accepted and considered; however, those who submit anonymous comments will not have standing to appeal the subsequent decision under 36 CFR Part 215. Upon completion of the Final EIS the document will be provided to the public for review and comment. Comments and USFS responses will be addressed and contained in the Final EIS.

Dated: December 23, 2004.

Cindy Rivera,

Acting Forest Supervisor.

[FR Doc. 04–28691 Filed 12–30–04; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Tuolumne County Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Tuolumne County Resource Advisory Committee (RAC) will meet on January 24, 2005 at the City of Sonora Fire Department, in Sonora, California. The purpose of the meeting is to review the Five-Year Vegetation management Plan, considerations for the leveraging of funds, and environmental requirements for non-Forest Service projects.

DATES: The meeting will be held January 24, 2005, from 12 p.m. to 3 p.m.

ADDRESSES: The meeting will be held at the City of Sonora Fire Department located at 201 South Shepherd Street, in Sonora, California (CA 95370)

FOR FURTHER INFORMATION CONTACT: Pat Kaunert, Committee Coordinator, USDA, Stanislaus National Forest, 19777 Greenley Road, Sonora, CA 95370 (209) 532–3671; E-mail *pkauner@fs.fed.us.*

SUPPLEMENTARY INFORMATION: Agenda items to be covered include: (1) Five-Year Vegetation Management Plan overview; (2) leveraging of funds for projects; (3) field trip needs/desires as related to showcasing projects; (4) concept paper regarding fuels reduction projects; (5) CEQA/NEPA environmental requirements for non-forest Service projects; and (6) public comment on meeting proceedings. This meeting is open to the public.

Dated: December 22, 2004.

Jerome E. Perez,

Deputy Forest Supervisor.

[FR Doc. 04–28657 Filed 12–30–04; 8:45 am]

BILLING CODE 3410–ED–M

DEPARTMENT OF AGRICULTURE

Forest Service

Notice of Lincoln County Resource Advisory Committee Meeting

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: Pursuant to the authorities in the Federal Advisory Committee Act (Pub. L. 92–463) and under the Secure Rural Schools and Community Self-Determination Act of 2000 (Pub. L. 106–393) the Kootenai National Forest's Lincoln County Resource Advisory Committee will meet on Wednesday January 12, 2005 at 6 p.m. at the Supervisor's Office in Libby, Montana for a business meeting. The meeting is open to the public.

DATES: January 12, 2005.

ADDRESSES: Kootenai National Forest, Supervisor's Office, 1101 U.S. Hwy 2 West, Libby, Montana.

FOR FURTHER INFORMATION CONTACT: Barbara Edgmon, Committee Coordinator, Kootenai National Forest at (406) 293–6211, or e-mail *bedgmon@fs.fed.us.*

SUPPLEMENTARY INFORMATION: Agenda topics include status of approved projects, plan for receiving and approving proposals for FY2006, and receiving public comment. If the meeting date or location is changed, notice will be posted in the local newspapers, including the Daily Interlake based in Kalispell, Montana.

Dated: December 22, 2004.

Cami Winslow,

Acting Forest Supervisor.

[FR Doc. 04–28658 Filed 12–30–04; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Southwest Oregon Provincial Advisory Committee; Notice of Meeting

SUMMARY: The Southwest Oregon Provincial Advisory Committee will meet on Tuesday, January 11th, 2005 to discuss topics including the Josephine County Fire Plan, Northern Spotted Owl Five Year Review, and fire plan working group report. The meeting will be held at the Josephine County Fairgrounds Art Building, 1451 Fairgrounds Road, Grants Pass, Oregon. It begins at 9 a.m., ends at 5 p.m.; the open public forum begins at 11:30 a.m. Written comments may be submitted prior to the meeting and delivered to Designated Federal Official, Scott Conroy at the Rogue River-Siskiyou National Forest, PO Box 520, Medford, OR 97501.

FOR FURTHER INFORMATION CONTACT: Rogue River-Siskiyou National Forest Public affairs Officer Patty Burel at (541) 858–2211, e-mail: *pburel@fs.fed.us*, or USDA Forest Service, PO Box 520, 333 West 8th Street, Medford, OR, 97501.

Dated: December 23, 2004.

Nancy Rose,

Acting Forest Supervisor, Rogue River-Siskiyou National Forest.

[FR Doc. 04–28656 Filed 12–30–04; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Southwest Washington Province Advisory Committee Meeting Notice

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Southwest Washington Province Advisory Committee will meet on Thursday, January 27, 2005, at the Gifford Pinchot National Forest Headquarters, 10600 NE 51st Circle, Vancouver, WA 98682. The meeting will begin at 9:30 a.m. and continue until 3:30 p.m.

The purpose of the meeting is to share information on the following programs: The status and plans for Forest bridges; effects to the Forest of recent and planned Federal Energy Regulatory Commission dam re-licensing actions; Forest monitoring activities; the proposed expansion of the White Pass Ski Area, and to share information among members.

All Southwest Washington Province Advisory Committee meetings are open to the public. Interested citizens are encouraged to attend. The ''open forum'' provides an opportunity for the public to bring issues, concerns, and discussion topics to the Advisory Committee. The ''open forum'' is scheduled for 1:30 p.m. Interested speakers will need to register prior to the open forum period. The committee welcomes the public's written comments on Committee business at any time.

FOR FURTHER INFORMATION CONTACT: Tom Knappenbeger, Public Affairs Officer, at (360) 891–5005, or write Forest Headquarters Office, Gifford Pinchot National Forest, 10600 NE. 51st Circle, Vancouver, WA 98682.

Dated: December 27, 2004.

Lynn Burditt,

Deputy Forest Supervisor.

[FR Doc. 04–28710 Filed 12–30–04; 8:45 am]

BILLING CODE 3410–11–M

ARCHITECTURAL AND TRANSPORTATION BARRIERS COMPLIANCE BOARD

Notice of Meeting

AGENCY: Architectural and Transportation Barriers Compliance Board.

SUMMARY: The Architectural and Transportation Barriers Compliance Board (Access Board) has scheduled its ad hoc committee and board meetings to take place in Washington, DC on Tuesday and Wednesday, January 11–12, 2005 as noted below.

DATES: The schedule of events is as follows:

Tuesday, January 11, 2005

1:30–5 p.m. Ad Hoc Committee on Public Rights-of-Way (Closed)

Wednesday, January 12, 2005

10–11 a.m. Technical Programs

11–Noon Planning and Budget

1:30–3 p.m. Board Meeting

ADDRESSES: The meeting will be held at the Marriott at Metro Center Hotel, 775 12th Street, NW., Washington, DC 20005.

FOR FURTHER INFORMATION CONTACT: For further information regarding this meeting, please contact Lawrence W. Roffee, Executive Director, (202) 272–0001 (voice) and (202) 272–0082 (TTY).

SUPPLEMENTARY INFORMATION: At the open portions of the Board meeting, the Access Board will consider the following agenda items: (a) Approval of the November 10, 2004 draft meeting minutes; (b) Technical Programs committee report; (c) Planning and Budget committee report; (d) new agency Web site; and, (e) appointment of the 2005 Nominating Committee Members. The Board meeting will be closed to the public for the Public Rights-of-Way rulemaking item.

This meeting is accessible to persons with disabilities. If you plan to attend and require a sign language interpreter or similar accommodation, please make your request with the Board by January 5, 2004. Persons attending Board meetings are requested to refrain from using perfume, cologne, and other fragrances for the comfort of other participants.

Lawrence W. Roffee,

Executive Director.

[FR Doc. 04–28706 Filed 12–30–04; 8:45 am]

BILLING CODE 8150–01–P

DEPARTMENT OF COMMERCE

International Trade Administration

Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of opportunity to request administrative review of antidumping or countervailing duty order, finding, or suspended investigation.

Background

Each year during the anniversary month of the publication of an antidumping or countervailing duty order, finding, or suspension of investigation, an interested party, as defined in section 771(9) of the Tariff Act of 1930, as amended (the Act), may request, in accordance with section 351.213 (2004) of the Department of Commerce (the Department) Regulations, that the Department conduct an administrative review of that antidumping or countervailing duty order, finding, or suspended investigation.

Opportunity to Request a Review: Not later than the last day of January 2005, interested parties may request administrative review of the following orders, findings, or suspended investigations, with anniversary dates in January for the following periods:

	Period
Antidumping Duty Proceedings	
Brazil:	
Brass Sheet and Strip, A–351–603	1/1/04–12/31/04
Prestressed Concrete Steel Wire Strand, A–351–837	7/17/03–12/31/04
Stainless Steel Wire Rod, A–351–819	1/1/04—12/31/04
Canada: Brass Sheet and Strip, A–122–601	1/1/04–12/31/04
France:	
Anhydrous Sodium Metasilicate (ASM), A–427–098	1/1/04–10/20/04
Stainless Steel Wire Rod, A–427–811	1/1/04–12/31/04
India: Prestressed Concrete Steel Wire Strand, A–533–828	7/17/03–12/31/04
Mexico: Prestressed Concrete Steel Wire Strand, A–201–831	7/17/03–12/31/04
South Africa: Ferrovanadium, A–791–815	1/1/04–2/31/04
South Korea: Prestressed Concrete Steel Wire Strand, A–580–852	7/17/03–12/31/04
South Korea: Top-of-the Stove Stainless Steel Cooking Ware, A–580–601	1/1/04—12/31/04
Taiwan: Top-of-the-Stove Stainless Steel Cooking Ware, A–583–603	1/1/04—12/31/04
Thailand: Prestressed Concrete Steel Wire Strand, A–549–820	7/17/03–12/31/04
The People's Republic of China:	
Ferrovanadium, A–570–873	1/1/04–12/31/04
Folding Gift Boxes, A–570–866	1/1/04–12/31/04
Potassium Permanganate, A–570–001	1/1/04—12/31/04
Countervailing Duty Proceedings	
Brazil: Brass Sheet and Strip, C–351–604	1/1/04–12/31/04
South Korea: Top-of-the-Stove Stainless Steel Cooking Ware, C–580–602	1/1/04—12/31/04
Taiwan: Top-of-the-Stove Stainless Steel Cooking Ware, C–583–604	1/1/04–12/31/04

Suspension Agreements

None.

In accordance with section 351.213(b) of the regulations, an interested party as defined by section 771(9) of the Act may request in writing that the Secretary conduct an administrative review. For both antidumping and countervailing duty reviews, the interested party must specify the individual producers or exporters covered by an antidumping finding or an antidumping or countervailing duty order or suspension agreement for which it is requesting a review, and the requesting party must state why it desires the Secretary to review those particular producers or exporters. If the interested party intends for the Secretary to review sales of merchandise by an exporter (or a producer if that producer also exports merchandise from other suppliers) which were produced in more than one country of origin and each country of origin is subject to a separate order, then the interested party must state specifically, on an order-by-order basis, which exporter(s) the request is intended to cover.

As explained in *Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 69 FR 23954 (May 6, 2003), the Department has clarified its practice with respect to the collection of final antidumping duties on imports of merchandise where intermediate firms are involved. The public should be aware of this clarification in determining whether to request an administrative review of merchandise subject to antidumping findings and orders. *See* also the Import Administration Web site at *www.ia.ita.doc.gov.*

Six copies of the request should be submitted to the Assistant Secretary for Import Administration, International Trade Administration, Room 1870, U.S. Department of Commerce, 14th Street & Constitution Avenue, NW., Washington, DC 20230. The Department also asks parties to serve a copy of their requests to the Office of Antidumping/Countervailing Duty Enforcement, Attention: Sheila Forbes, in room 3065 of the main Commerce Building. Further, in accordance with section 351.303(f)(l)(i) of the regulations, a copy of each request must be served on every party on the Department's service list.

The Department will publish in the **Federal Register** a notice of ''Initiation of Administrative Review of Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation'' for requests received by the last day of January 2005. If the Department does not receive, by the last day of January 2005, a request for review of entries covered by an order, finding, or suspended investigation listed in this notice and for the period identified above, the Department will instruct the Customs Service to assess antidumping or countervailing duties on those entries at a rate equal to the cash deposit of (or bond for) estimated antidumping or countervailing duties required on those entries at the time of entry, or withdrawal from warehouse, for consumption and to continue to

collect the cash deposit previously ordered.

This notice is not required by statute but is published as a service to the international trading community.

Dated: December 23, 2004.

Howard B. Smith,

Acting Senior Office Director, Office 4 for Import Administration.

[FR Doc. E4–3911 Filed 12–30–04; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Initiation of Five-Year (''Sunset'') Reviews

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of initiation of Five-Year (''Sunset'') reviews.

SUMMARY: In accordance with section 751(c) of the Tariff Act of 1930, as amended (''the Act''), the Department of Commerce (''the Department'') is automatically initiating five-year (''sunset'') reviews of certain antidumping duty orders. The International Trade Commission is publishing concurrently with this notice its notice of *Institution of Five-Year Review* which covers these same orders.

FOR FURTHER INFORMATION CONTACT: Martha V. Douthit, Office of Policy, Import Administration, International Trade Administration, U.S. Department of Commerce at (202) 482–5050, or Mary Messer, Office of Investigations, U.S. International Trade Commission at (202) 205–3193.

DATES: *Effective Date:* January 3, 2005.

SUPPLEMENTARY INFORMATION:

Background

The Department's procedures for the conduct of sunset reviews are set forth in 19 CFR 351.218. Guidance on methodological or analytical issues relevant to the Department's conduct of sunset reviews is set forth in the Department's Policy Bulletin 98.3—*Policies Regarding the Conduct of Five-Year (''Sunset'') Reviews of Antidumping and Countervailing Initiation of Reviews.*

In accordance with 19 CFR 351.218(c), we are initiating sunset reviews of the following antidumping and countervailing duty orders:

DOC case No.	ITC case No. and product	Country
A–570–003	A–103 Cotton Shop Towels	China.
C–535–001	C–202 Cotton Shop Towels	Pakistan.
A–538–802	A–514 Cotton Shop Towels	Bangladesh.
A–570–852	A–814 Creatine Monohydrate	China.
A–580–507	A–279 Malleable Cast Iron Pipe Fittings	South Korea.
A–588–605	A–347 Malleable Cast Iron Pipe Fittings	Japan.
A–427–816	A–816 Certain Cut-to-Length Carbon Quality Steel Plate.	France.
A–533–817	A–817 Certain Cut-to-Length Carbon Quality Steel Plate.	India.
C–533–818	C–388 Certain Cut-to-Length Carbon Quality Steel Plate.	India.
A–560–805	A–818 Certain Cut-to-Length Carbon Quality Steel Plate.	Indonesia.
C–560–806	C–389 Certain Cut-to-Length Carbon Quality Steel Plate.	Indonesia.
A–475–826	A–819 Certain Cut-to-Length Carbon Quality Steel Plate.	Italy.
C–475–827	C–390 Certain Cut-to-Length Carbon Quality Steel Plate.	Italy.
A–588–827	A–820 Certain Cut-to-Length Carbon Quality Steel Plate.	Japan.
A–580–836	A–821 Certain Cut-to Length Carbon Quality Steel Plate.	South Korea.
C–580–837	C–391 Certain Cut-to-Length Carbon Quality Steel Plate.	South Korea.
A–122–804	A–422 New Steel Rails	Canada.
C–122–805	C–297 New Steel Rails	Canada.

Filing Information

As a courtesy, we are making information related to sunset proceedings, including copies of the Department's regulations regarding sunset reviews (19 CFR 351.218) and *Sunset Policy Bulletin,* the Department's schedule of sunset reviews, case history information (*i.e.*, previous margins, duty absorption determinations and scope language), and service lists available to the public on the Department's sunset Internet Web site at the following address: *http://ia.ita.doc.gov/sunset/*.

All submissions in these sunset reviews must be filed in accordance with the Department's regulations regarding format, translation, service, and certification of documents. These regulations can be found at 19 CFR 351.303. Also, we suggest that parties check the Department's sunset Web site for any updates to the service list before filing any submissions. The Department will make additions to and/or deletions from the service list provided on the sunset Web site based on notifications from parties and participation in these reviews. Specifically, the Department will delete from the service list all parties that do not submit a substantive response to the notice of initiation.

Because deadlines in a sunset review are, in many instances, very short, we urge interested parties to apply for access to proprietary information under administrative protective order (''APO'') immediately following publication in the **Federal Register** of the notice of initiation of the sunset review. The Department's regulations on submission of proprietary information and eligibility to receive access to business

proprietary information under APO can be found at 19 CFR 351.304–306.

Information Required From Interested Parties

Domestic interested parties (defined in sections 771(9)(C), (D), (E), (F), and (G) of the Act and 19 CFR 351.102(b)) wishing to participate in these sunset reviews must respond not later than 15 days after the date of publication in the **Federal Register** of the notice of initiation by filing a notice of intent to participate. The required contents of the notice of intent to participate are set forth at 19 CFR 351.218(d)(1)(ii). In accordance with the Department's regulations, if we do not receive a notice of intent to participate from at least one domestic interested party by the 15-day deadline, the Department will automatically revoke the orders without further review. *See* 19 CFR 351.218(d)(1)(iii).

If we receive an order-specific notice of intent to participate from a domestic interested party, the Department's regulations provide that all parties wishing to participate in the sunset review must file complete substantive responses not later than 30 days after the date of publication in the **Federal Register** of the notice of initiation. The required contents of a substantive response, on an order-specific basis, are set forth at 19 CFR 351.218(d)(3). Note that certain information requirements differ for respondent and domestic parties. Also, note that the Department's information requirements are distinct from the International Trade Commission's information requirements. Please consult the Department's regulations for information regarding the Department's conduct of sunset reviews.[1] Please consult the Department's regulations at 19 CFR Part 351 for definitions of terms and for other general information concerning antidumping and countervailing duty proceedings at the Department.

This notice of initiation is being published in accordance with section 751(c) of the Act and 19 CFR 351.218(c).

[1] In comments made on the interim final sunset regulations, a number of parties stated that the proposed five-day period for rebuttals to substantive responses to a notice of initiation was insufficient. This requirement was retained in the final sunset regulations at 19 CFR 351.218(d)(4). As provided in 19 CFR 351.302(b), however, the Department will consider individual requests for extension of that five-day deadline based upon a showing of good cause.

Dated: December 17, 2004.

James J. Jochum,

Assistant Secretary for Import Administration.

[FR Doc. 04–28724 Filed 12–30–04; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–122–838]

Certain Softwood Lumber Products From Canada: Extension of the Time Limit for the Preliminary Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

DATES: *Effective Date:* January 3, 2005.

FOR FURTHER INFORMATION CONTACT: Constance Handley or James Kemp, at (202) 482–0631 or (202) 482–5346, respectively; AD/CVD Operations, Office 1, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street & Constitution Avenue, NW., Washington, DC 20230.

Background

On June 30, 2004, the Department of Commerce (the Department) published a notice of initiation of administrative review of the antidumping duty order on certain softwood lumber products from Canada, covering the period May 1, 2003, through April 30, 2004. *See Notice of Initiation of Antidumping Duty Administrative Review*, 69 FR 39409 (June 30, 2004). The preliminary results are currently due no later than January 31, 2005. The review covers over four hundred producers/exporters of subject merchandise to the United States, of which eight are being individually examined.

Extension of Time Limit for Preliminary Results of Review

Section 751(a)(3)(A) of the Tariff Act of 1930, as amended (the Act), requires the Department of Commerce (the Department) to complete the preliminary results of an administrative review within 245 days after the last day of the anniversary month of an order/finding for which a review is requested. However, if it is not practicable to complete the review within these time periods, section 751(a)(3)(A) of the Act allows the Department to extend the time limit for the preliminary results to a maximum of 365 days after the last day of the anniversary month of an order/finding for which a review is requested. We determine that it is not practicable to complete the preliminary results of this review within the original time limit due to a number of complex issues which must be addressed prior to the issuance of those results. For example, the Department must analyze the complex corporate structures and affiliations of the eight respondents in this review, including affiliated mills and other entities both in Canada and the United States. In addition, as is our practice, the Department intends to conduct verification of a number of the respondents prior to the issuance of the preliminary results. We estimate that the sales and cost of production verifications will take approximately two months to complete.

Accordingly, the Department is extending the time limit for completion of the preliminary results of this administrative review until no later than June 1, 2005. We intend to issue the final results no later than 120 days after publication of the preliminary results notice.

Dated: December 27, 2004.

Gary S. Taverman,

Acting Deputy Assistant Secretary for Import Administration.

[FR Doc. E4–3910 Filed 12–30–04; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–580–841]

Notice of Extension of Time Limit for the Final Results of Antidumping Duty Administrative Review: Structural Steel Beams From the Republic of Korea

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

DATES: *Effective Date:* January 3, 2005.

FOR FURTHER INFORMATION CONTACT: Mark Flessner (202) 482–6312 or Robert James (202) 482–0649, Antidumping and Countervailing Duty Operations, Office Seven, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

Background

On September 3, 2004, the Department of Commerce (the Department) published the preliminary results of administrative review of the antidumping order covering structural steel beams from the Republic of Korea. *See Structural Steel Beams from Korea:*

Preliminary Results of Antidumping Duty Administrative Review, 69 FR 53887 (September 3, 2004).

Pursuant to the time limits for administrative reviews set forth in section 751(a)(3)(A) of the Tariff Act of 1930, as amended (the Tariff Act), currently the final results of this administrative review are due on January 1, 2005. It is not practicable to complete this review within the normal statutory time limit due to a complicated issue involving revision of the model match hierarchy. Thus, it is not practicable to complete this review within the normal statutory time limit. Therefore, the Department is extending the time limit for completion of the final results until February 1, 2005, in accordance with section 751(a)(3)(A) of the Tariff Act.

This notice is published in accordance with section 751(a)(3)(A) of the Act and section 19 CFR 351.213(h)(2) of the Department's regulations.

Dated: December 27, 2004.

Gary S. Taverman,

Acting Deputy Assistant Secretary for Import Administration.

[FR Doc. E4–3909 Filed 12–30–04; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 122804A]

North Pacific Fishery Management Council; Notice of Public Meeting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Meetings of the North Pacific Fishery Management Council Gulf Rationalization Community Committee.

SUMMARY: The North Pacific Fishery Management Council (Council) Gulf Rationalization Community Committee will meet at the Hotel Captain Cook.

DATES: January 28, 2005, 8 am – 5 pm, Voyager Room.

ADDRESSES: Hotel Captain Cook, 4th and K Street, Anchorage, AK 99501

Council address: North Pacific Fishery Management Council, 605 W. 4th Ave., Suite 306, Anchorage, AK 99501–2252.

FOR FURTHER INFORMATION CONTACT: Nicole Kimball, Council staff, Phone: 907–271–2809.

SUPPLEMENTARY INFORMATION: The Committee will discuss the future funding of the CFQ Program, the administrative entity(ies) structure, and how CFQ or purchased shares would be distributed and used among eligible communities.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Gail Bendixen at 907–271–2809 at least 7 working days prior to the meeting date.

Dated: December 28, 2004.

Alan D. Risenhoover,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. E4–3906 Filed 12–30–04; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 120904C]

Marine Mammals and Endangered Species; Permits No. 782–1702–03 and 1409–01

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Issuance of permit amendment and modification.

SUMMARY: Notice is hereby given that the following applicants have been issued an amendment/modification to their scientific research permit.

Permit No. 782–1702–03 - National Marine Mammal Laboratory, National Marine Fisheries Service, NOAA, 7600 Sand Point Way, NE, BIN C15700, Bldg. 1, Seattle, WA 98115–0070, [Dr. John Bengtson, Principal Investigator]; and

Permit No. 1409–01 - Karen G. Holloway-Adkins [Principal Investigator], Executive Director, East Coast Biologists, Inc. P.O. Box 33715, Indialantic, FL 32903.

ADDRESSES: The amendment, modification and related documents are available for review upon written request or by appointment in the following office(s):

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301)713–2289; fax (301)713–0376; and

Permit No. 782–1702–03 - Northwest Region, NMFS, 7600 Sand Point Way NE, BIN C15700, Bldg. 1, Seattle, WA 98115–0700; phone (206)526–6150; fax (206)526–6426;

Alaska Region, NMFS, P.O. Box 21668, Juneau, AK 99802–1668; phone (907)586–7221; fax (907)586–7249; and

Southwest Region, NMFS, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802–4213; phone (562)980–4001; fax (562)980–4018.

Permit No. 1409–01 - Southeast Region, NMFS, 9721 Executive Center Drive North, St. Petersburg, FL 33702–2432; phone (727)570–5301; fax (727)570–5320.

FOR FURTHER INFORMATION CONTACT: Ruth Johnson, Amy Sloan or Patrick Opay (301)713–2289.

SUPPLEMENTARY INFORMATION: On October 13, 2004, notice was published in the **Federal Register** (69 FR 60841) that an amendment of permit no. 782–1702–02 and modification of permit no. 1409 had been requested by the above-named organization and individual. The requested amendment and modification have been granted under the authority of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), the Regulations Governing the Taking and Importing of Marine Mammals (50 CFR part 216), the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR 222–226), and the Fur Seal Act of 1966, as amended (16 U.S.C. 1151 *et seq.*).

Permit Amendment

Permit No. 782–1702–03 authorizes an increase in the number of California sea lions (*Zalophus californianus*) that may be accidentally killed from five per year to seven for the year spanning July 1, 2004 to June 30, 2005 (starting July 1, 2005, the authorized accidental mortality would revert to five annually).

Permit Modification

Permit No. 1409–01 authorizes attachment of sonic tags to 15 green sea turtles (*Chelonia mydas*) to document the movements, foraging locations, behavior, resting sites, and daily movement patterns in nearshore reefs in central Brevard County.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), a final determination has been made that the activity proposed in permit 782–1702–03 is categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement. For permit 1409–01 an environmental assessment was prepared analyzing the effects of the permitted activities. After

a Finding of No Significant Impact, the determination was made that it was not necessary to prepare an environmental impact statement.

Issuance of these permits, as required by the ESA, was based on a finding that such permits: (1) were applied for in good faith; (2) will not operate to the disadvantage of such endangered species; and (3) are consistent with the purposes and policies set forth in section 2 of the ESA.

Dated: December 27, 2004.

Stephen L. Leathery,

Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 04–28739 Filed 12–30–04; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 122704B]

Marine Mammals; File Nos. 881–1668, 1010–1641, 782–1532, 434–1669, and 800–1664

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Issuance of permit amendments.

SUMMARY: Notice is hereby given that the following organizations and individual have been issued amendments to permits for scientific research on Steller sea lions (*Eumetopias jubatus*): The Alaska SeaLife Center, Seward, Alaska (Permit No. 881–1668); The Aleutians East Borough, Kodiak, Alaska (Permit No. 1010–1641); The National Marine Mammal Laboratory, NMFS, Seattle, Washington (Permit No. 782–1532); The Oregon Department of Fish and Wildlife, Corvallis, Oregon (Permit No. 434–1669); and Dr. Randall Davis, Texas A&M University, Department of Marine Biology, Galveston, Texas (Permit No. 800–1664).

ADDRESSES: The amendments and related documents are available for review upon written request or by appointment in the following office(s):

All permits - Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301)713–2289; fax (301)713–0376;

Permit No. 434–1669 - Northwest Region, NMFS, 7600 Sand Point Way NE, BIN C15700, Bldg. 1, Seattle, WA 98115–0700; phone (206)526–6150; fax (206)526–6426; and

All permits - Alaska Region, NMFS, P.O. Box 21668, Juneau, AK 99802–1668; phone (907)586–7221; fax (907)586–7249.

FOR FURTHER INFORMATION CONTACT: Dr. Tammy Adams or Amy Sloan, (301)713–2289.

SUPPLEMENTARY INFORMATION: On June 27, 2002 , notice was published in the **Federal Register** (67 FR 43283) that requests for permits and permit amendments to ''take'' Steller sea lions by harassment during scientific research had been submitted by the above-named individuals/organizations. The permits and permit amendments were issued on November 12, 2002 (67 FR 697243). Amendments to these permits have been issued under the authority of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), the Regulations Governing the Taking and Importing of Marine Mammals (50 CFR part 216), the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR 222–226).

These minor amendments extend the expiration date for all five permits from December 31, 2004 to December 31, 2005. These five permits authorize ''takes'' of Steller sea lions by harassment during a variety of research activities. These amendments do not authorize any additional ''takes'' of Steller sea lions. Rather, they allow the permit holders an additional 12 months to use any research-related harassment ''takes'' remaining from the 2004 permit year.

Issuance of these permit amendments, as required by the ESA, was based on a finding that such permit amendments: (1) were applied for in good faith; (2) will not operate to the disadvantage of such endangered species; and (3) are consistent with the purposes and policies set forth in section 2 of the ESA.

Dated: December 27, 2004.

Tammy C. Adams,

Acting Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 04–28740 Filed 12–30–04; 8:45 am]

BILLING CODE 3510–22–S

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Determination Under the African Growth and Opportunity Act

December 23, 2004.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Directive to the Commissioner of Customs.

SUMMARY: The Committee for the Implementation of Textile Agreements (CITA) has determined that certain textile and apparel goods from Mozambique shall be treated as ''handloomed, handmade, or folklore articles'' and qualify for preferential treatment under the African Growth and Opportunity Act. Imports of eligible products from Mozambique with an appropriate AGOA visa will qualify for duty-free treatment.

EFFECTIVE DATE: January 10, 2005

FOR FURTHER INFORMATION CONTACT: Anna Flaaten, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482-3400.

SUPPLEMENTARY INFORMATION:

Authority: The African Growth and Opportunity Act (Title I of the Trade and Development Act of 2000, Pub. L. No. 106-200) (AGOA) provides preferential tariff treatment for imports of certain textile and apparel products of beneficiary sub-Saharan African countries, including handloomed, handmade, or folklore articles of a beneficiary country that are certified as such by the competent authority in the beneficiary country. In Executive Order 13191, the President authorized CITA to consult with beneficiary sub-Saharan African countries and to determine which, if any, particular textile and apparel goods shall be treated as being handloomed, handmade, or folklore articles. (66 FR 7272).

In a letter to the Commissioner of Customs dated January 18, 2001, the United States Trade Representative directed Customs to require that importers provide an appropriate export visa from a beneficiary sub-Saharan African country to obtain preferential treatment under section 112(a) of the AGOA (66 FR 7837). The first digit of the visa number corresponds to one of nine groupings of textile and apparel products that are eligible for preferential tariff treatment. Grouping ''9'' is reserved for handmade, handloomed, or folklore articles.

CITA has consulted with Mozambican authorities, and has determined that handloomed fabrics, handloomed articles (e.g., handloomed rugs, scarves, place mats, and tablecloths), handmade

articles made from handloomed fabrics, and the folklore articles described in the annex to this notice, if produced in and exported from Mozambique, are eligible for preferential tariff treatment under section 112(a) of the AGOA. In the letter published below, CITA directs the Commissioner of Customs and Border Protection to allow duty-free entry of such products under U.S. Harmonized Tariff Schedule subheading 9819.11.27 if accompanied by an appropriate AGOA visa in grouping ''9''.

D. Michael Hutchinson,

Acting Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements

December 23, 2004.

Commissioner,
Bureau of Customs and Border Protection, Washington, DC 20229.

Dear Commissioner: The Committee for the Implementation of Textiles Agreements (CITA), pursuant to Sections 112(a) of the African Growth and Opportunity Act (Title I of Pub. L. No. 106-200) (AGOA) and Executive Order 13191 of January 17, 2001, has determined, effective on January 10, 2005, that the following articles shall be treated as ''handloomed, handmade, and folklore articles'' under the AGOA: (a) handloomed fabrics, handloomed articles (e.g., handloomed rugs, scarves, placemats, and tablecloths), and handmade articles made from handloomed fabrics, if made in Mozambique from fabric handloomed in Mozambique; and (b) the folklore articles described in the attachment to this letter, if made in Mozambique. Such articles are eligible for duty-free treatment only if entered under subheading 9819.11.27 and accompanied by a properly completed visa for product grouping ''9'', in accordance with the provisions of the Visa Arrangement between the Government of Mozambique and the Government of the United States Concerning Textile and Apparel Articles Claiming Preferential Tariff Treatment under Section 112 of the Trade and Development Act of 2000. After additional consultations with Mozambican authorities, CITA may determine that other textile and apparel goods shall be treated as folklore articles.

Sincerely,
D. Michael Hutchinson,
Acting Chairman, Committee for the Implementation of Textile Agreements.

ANNEX

CITA has determined that the following textile and apparel goods shall be treated as folklore articles for purposes of the AGOA if made in Mozambique. Articles must be ornamented in characteristic Mozambican or regional folk style. An article may not include modern features such as zippers, elastic, elasticized fabrics, or hook-and-pile fasteners (such as velcroc or similar holding fabric). An article may not incorporate patterns that are not traditional or historical to Mozambique, such as airplanes, buses, cowboys, or cartoon characters and may not incorporate designs referencing holidays or festivals not common to traditional Mozambican culture, such as Halloween and Thanksgiving.

Eligible folklore articles:

(a) Traditional Shirt

The article is a loose-fitting, straight-seamed shirt made of tie-dyed fabric. Sleeves are half to three-quarter in length. The neckline is rounded, slit, or v-shaped without collar. There is intricate embroidery around the neckline, outer trim of sleeves, and lower hem. May or may not have square-shaped breast and lower front pockets, also generally trimmed with intricate embroidery.

(b) Women's Traditional Tunic/ Mozambican Pedaços

A loose flowing, straight-seamed, non-tailored, full-length outer tunic, made of tie-dyed or other colorful fabric. The neckline is rounded, slit, or v-shaped, without collar. There is intricate embroidery around the neckline and outer trim of sleeves. The neckline can be round or have a slit down the center front. Accompanying head wrap is a rectangular piece of matching fabric.

[FR Doc. 04–28715 Filed 12–30–04; 8:45 am]

BILLING CODE 3510–DS–S

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Adjustment of Import Limits for Certain Cotton and Man-Made Fiber Textile Products Produced or Manufactured in Indonesia

December 27, 2004.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner, Bureau of Customs and Border Protection adjusting limits.

EFFECTIVE DATE: December 30, 2004.

FOR FURTHER INFORMATION CONTACT: Ross Arnold, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482–4212. For information on the quota status of these limits, refer to the Bureau of Customs and Border Protection website (http://www.cbp.gov), or call (202) 344-2650. For information on embargoes and quota re-openings, refer to the Office of Textiles and Apparel website at http://otexa.ita.doc.gov.

SUPPLEMENTARY INFORMATION:

Authority: Section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854); Executive Order 11651 of March 3, 1972, as amended.

The current limit for Categories 647/648 is being increased for the cancellation of special shift, reducing the limit for Categories 347/348 to account for the special shift being returned to Category 647/648.

A description of the textile and apparel categories in terms of HTS numbers is available in the CORRELATION: Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States (see **Federal Register** notice 69 FR 4926, published on February 2, 2004). Also see 68 FR 65254, published on November 19, 2003.

D. Michael Hutchinson,

Acting Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements

December 27, 2004.

Commissioner,
Bureau of Customs and Border Protection, Washington, DC 20229.

Dear Commissioner: This directive amends, but does not cancel, the directive issued to you on November 13, 2003, by the Chairman, Committee for the Implementation of Textile Agreements. That directive concerns imports of certain cotton, wool, man-made fiber, silk blend and other vegetable fiber textiles and textile products, produced or manufactured in Indonesia and exported during the twelve-month period which began on January 1, 2004 and extends through December 31, 2004.

Effective on December 30, 2004, you are directed to adjust the limits for the categories listed below, as provided for under the Uruguay Round Agreement on Textiles and Clothing:

Category	Twelve-month restraint limit [1]
Levels in Group I	
347/348	3,226,042 dozen.
647/648	6,006,332 dozen.

[1] The limits have not been adjusted to account for any imports exported after December 31, 2003.

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,
D. Michael Hutchinson,
Acting Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc.04–28713 Filed 12–30–04; 8:45 am]

BILLING CODE 3510–DS–S

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Request for Public Comments on Commercial Availability Petition under the African Growth and Opportunity Act (AGOA), the United States-Caribbean Basin Trade Partnership Act (CBTPA), and the Andean Trade Promotion and Drug Eradication Act (ATPDEA)

December 29, 2004.

AGENCY: The Committee for the Implementation of Textile Agreements (CITA)

ACTION: Request for public comments concerning a petition for a determination that certain ring spun single yarns, made of micro modal fibers, cannot be supplied by the domestic industry in commercial quantities in a timely manner under the AGOA, the CBTPA, and the ATPDEA.

SUMMARY: On December 27, 2004, the Chairman of CITA received a petition from Alston and Bird, L.L.P., on behalf of their client, Texollini, Inc., alleging that ring spun single yarns of English yarn numbers 30 and higher of 0.9 denier or finer micro modal fibers, classified in subheading 5510.11.000 of the Harmonized Tariff Schedule of the United States (HTSUS), cannot be supplied by the domestic industry in commercial quantities in a timely manner. The petition requests that women's and girls' knit apparel articles from such yarns or from U.S.-formed fabrics containing such yarns be eligible for preferential treatment under the AGOA, the CBTPA, and the ATPDEA. CITA hereby solicits public comments on this request, in particular with regard to whether such yarns can be supplied by the domestic industry in commercial quantities in a timely manner. Comments must be submitted by January 18, 2005 to the Chairman, Committee for the Implementation of Textile Agreements, Room 3001, United States Department of Commerce, 14th and Constitution Avenue, N.W. Washington, D.C. 20230.

FOR FURTHER INFORMATION CONTACT: Janet Heinzen, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482-3400.

SUPPLEMENTARY INFORMATION:

Authority: Section 112(b)(5)(B) of the AGOA; Section 213(b)(2)(A)(v)(II) of the CBTPA, as added by Section 211(a) of the CBTPA; Sections 1 and 6 of Executive Order No. 13191 of January 17, 2001; Section 204 (b)(3)(B)(ii) of the ATPDEA, Presidential Proclamation 7616 of October 31, 2002, Executive Order 13277 of November 19, 2002, and the United States Trade Representative's Notice of Further Assignment of Functions of November 25, 2002.

BACKGROUND:

The AGOA, the CBTPA, and the ATPDEA provide for quota- and duty-free treatment for qualifying textile and apparel products. Such treatment is generally limited to products manufactured from yarns and fabrics formed in the United States or a beneficiary country. The AGOA, the CBTPA, and the ATPDEA also provide for quota- and duty-free treatment for apparel articles that are both cut (or knit-to-shape) and sewn or otherwise assembled in one or more beneficiary countries from fabric or yarn that is not formed in the United States, if it has been determined that such fabric or yarn cannot be supplied by the domestic industry in commercial quantities in a timely manner. In Executive Order No. 13191 (66 FR 7271) and pursuant to Executive Order No. 13277 (67 FR 70305) and the United States Trade Representative's Notice of Redelegation of Authority and Further Assignment of Functions (67 FR 71606), the President delegated to CITA the authority to determine whether yarns or fabrics cannot be supplied by the domestic industry in commercial quantities in a timely manner under the AGOA, the CBTPA, or the ATPDEA. On March 6, 2001, CITA published procedures that it will follow in considering requests (66 FR 13502).

On December 27, 2004, the Chairman of CITA received a petition from Texollini, Inc., alleging that ring spun single yarn of English yarn numbers 30 and higher of 0.9 denier or finer micro modal fibers, classified in subheading 5510.10.000 of the HTSUS, for use in women's and girls' knit apparel articles, cannot be supplied by the domestic industry in commercial quantities in a timely manner. It requests quota- and duty-free treatment under the AGOA, the CBTPA, and the ATPDEA for these apparel articles that are both cut (or knit-to-shape) and sewn in one or more AGOA, CBTPA, or ATPDEA beneficiary countries from such yarns or U.S.-formed fabrics containing such yarns.

CITA is soliciting public comments regarding this request, particularly with respect to whether this yarn can be supplied by the domestic industry in commercial quantities in a timely manner. Also relevant is whether other yarns that are supplied by the domestic industry in commercial quantities in a timely manner are substitutable for this yarn for purposes of the intended use. Comments must be received no later than January 18, 2005. Interested persons are invited to submit six copies of such comments or information to the Chairman, Committee for the Implementation of Textile Agreements, room 3100, U.S. Department of Commerce, 14th and Constitution Avenue, N.W., Washington, DC 20230.

If a comment alleges that this yarn can be supplied by the domestic industry in commercial quantities in a timely manner, CITA will closely review any supporting documentation, such as a signed statement by a manufacturer of the yarn stating that it produces the yarn that is the subject of the request, including the quantities that can be supplied and the time necessary to fill an order, as well as any relevant information regarding past production.

CITA will protect any business confidential information that is marked ''business confidential'' from disclosure to the full extent permitted by law. CITA will make available to the public non-confidential versions of the request and non-confidential versions of any public comments received with respect to a request in room 3100 in the Herbert Hoover Building, 14th and Constitution Avenue, N.W., Washington, DC 20230. Persons submitting comments on a request are encouraged to include a non-confidential version and a non-confidential summary.

D. Michael Hutchinson,

Acting Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 04–28750 Filed 12–29–04; 2:39 pm]

BILLING CODE 3510–DS–S

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Denial of Commercial Availability Requests under the United States-Caribbean Basin Trade Partnership Act (CBTPA)

December 23, 2004.

AGENCY: The Committee for the Implementation of Textile Agreements (CITA).

ACTION: Denial of the requests alleging that certain circular knit jersey fabrics for use in apparel articles cannot be supplied by the domestic industry in commercial quantities in a timely manner under the CBTPA.

SUMMARY: On October 19, 2004, the Chairman of CITA received two petitions from Sandler, Travis & Rosenberg, P.A., on behalf of Jaclyn, Inc. of New York, alleging that certain circular single knit jersey fabrics of the

specifications detailed below, classified in subheadings 6006.31.00.80 and 6006.32.00.80 of the Harmonized Tariff Schedule of the United States (HTSUS), cannot be supplied by the domestic industry in commercial quantities in a timely manner. These petitions requested that women's and girl's nightwear of such fabric assembled in one or more CBTPA beneficiary countries be eligible for preferential treatment under the CBTPA.

FOR FURTHER INFORMATION CONTACT: Anna Flaaten, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482-3400.

SUPPLEMENTARY INFORMATION:

Authority: Section 213(b)(2)(A)(v)(II) of the Caribbean Basin Economic Recovery Act, as added by Section 211(a) of the CBTPA; Section 6 of Executive Order No. 13191 of January 17, 2001.

BACKGROUND:

The CBTPA provides for quota- and duty-free treatment for qualifying textile and apparel products. Such treatment is generally limited to products manufactured from yarns and fabrics formed in the United States or a beneficiary country. The CBTPA also provides for quota- and duty-free treatment for apparel articles that are both cut (or knit-to-shape) and sewn or otherwise assembled in one or more CBTPA beneficiary countries from fabric or yarn that is not formed in the United States, if it has been determined that such fabric or yarn cannot be supplied by the domestic industry in commercial quantities in a timely manner. In Executive Order No. 13191, the President delegated to CITA the authority to determine whether yarns or fabrics cannot be supplied by the domestic industry in commercial quantities in a timely manner under the CBTPA and directed CITA to establish procedures to ensure appropriate public participation in any such determination. On March 6, 2001, CITA published procedures that it will follow in considering requests (66 FR 13502).

On October 19, 2004, the Chairman of CITA received two petitions from Sandler, Travis & Rosenberg, P.A., on behalf of Jaclyn, Inc. of New York (Jaclyn), alleging that certain circular single knit jersey fabrics of the specifications detailed below, classified in subheadings 6006.31.00.80 and 6006.32.00.80 of the HTSUS, cannot be supplied by the domestic industry in commercial quantities in a timely manner. These petitions requested that women's and girl's nightwear of such fabrics assembled in one or more CBTPA beneficiary countries be eligible for preferential treatment under the CBTPA.

Specifications:

Specifications:	
Fabric #1	
Fabric Description:	single knit jersey, jacquard geometric rib stitch
Petitioner Style No:	4934A
HTS Subheading:	6006.32.00.80
Fiber Content:	66-68% polyester staple/32-34% cotton/0.2-0.5% spandex
Weight:	6.165 sq. meters/kg
Yarn Size:	54.14 metric (32/1 English), spun, filament core
Gauge:	24
Finish:	(Piece) dyed
Stretch Characteristics:	Minimum 25% from relaxed state; 90% recovery to relaxed state
Fabric #2	
Fabric Description:	single knit jersey, jacquard geometric rib stitch
Petitioner Style No:	4944S
HTS Subheading:	6006.31.00.80 & 6006.32.00.80
Fiber Content:	64% polyester/35.5 - 35.8% cotton/0.2 - 0.5% spandex
Weight:	6.06 sq. meters/kg
Yarn Size:	54.14 metric (32/1 English), spun, filament core
Gauge:	28
Finish:	Bleached or (Piece) dyed
Stretch Characteristics:	25% from relaxed state; 90% recovery to relaxed state

On October 26, 2004, CITA published a **Federal Register** notice requesting public comments on the requests, particularly with respect to whether these fabrics can be supplied by the domestic industry in commercial quantities in a timely manner. On November 16, 2004, CITA and the Office of the U.S. Trade Representative offered to hold consultations with the relevant Congressional committees. We also requested the advice of the U.S. International Trade Commission and the relevant Industry Trade Advisory Committees.

Given the information in the ITC report and provided by the domestic industry, CITA finds that there is domestic capacity and ability to supply both 24-gauge and 28-gauge circular knit fabric. The ITC report and follow-up calls made by a CITA representative confirmed that there are several U.S. companies that have 24-gauge or 28-gauge knitting machines, or both, and state they have the ability to make the subject fabrics in commercial quantities and in a timely manner.

On the basis of currently available information and our review of this request, CITA has determined that the domestic industry can supply the subject fabric described above in commercial quantities in a timely manner. Jaclyn's requests are denied.

D. Michael Hutchinson,

Acting Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc.04–28716 Filed 12–30–04; 8:45 am]

BILLING CODE 3510–DS–S

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Denial of Commercial Availability Request under the United States-Caribbean Basin Trade Partnership Act (CBTPA)

December 23, 2004.

AGENCY: The Committee for the Implementation of Textile Agreements (CITA).

ACTION: Denial of the request alleging that certain circular knit jersey fabric for use in apparel articles cannot be supplied by the domestic industry in commercial quantities in a timely manner under the CBTPA.

SUMMARY: On August 31, 2004, the Chairman of CITA received a petition from Sandler, Travis & Rosenberg, P.A., on behalf of Jaclyn, Inc. of New York, alleging that certain circular single knit jersey fabric of the specifications detailed below cannot be supplied by the domestic industry in commercial quantities in a timely manner. The petition requests that women's and girl's nightwear of such fabric assembled in one or more CBTPA beneficiary countries be eligible for preferential treatment under the CBTPA.

FOR FURTHER INFORMATION CONTACT: Anna Flaaten, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482-3400.

SUPPLEMENTARY INFORMATION:

Authority: Section 213(b)(2)(A)(v)(II) of the Caribbean Basin Economic Recovery Act, as added by Section 211(a) of the CBTPA; Section 6 of Executive Order No. 13191 of January 17, 2001.

BACKGROUND:

The CBTPA provides for quota- and duty-free treatment for qualifying textile and apparel products. Such treatment is generally limited to products manufactured from yarns and fabrics formed in the United States or a beneficiary country. The CBTPA also provides for quota- and duty-free treatment for apparel articles that are both cut (or knit-to-shape) and sewn or otherwise assembled in one or more CBTPA beneficiary countries from fabric or yarn that is not formed in the United

States, if it has been determined that such fabric or yarn cannot be supplied by the domestic industry in commercial quantities in a timely manner. In Executive Order No. 13191, the President delegated to CITA the authority to determine whether yarns or fabrics cannot be supplied by the domestic industry in commercial quantities in a timely manner under the CBTPA and directed CITA to establish procedures to ensure appropriate public participation in any such determination. On March 6, 2001, CITA published procedures that it will follow in considering requests (66 FR 13502).

On August 31, 2004, the Chairman of CITA received a petition from Sandler, Travis & Rosenberg, P.A., on behalf of Jaclyn, Inc. of New York (Jaclyn), alleging that certain circular single knit jersey fabric of the specifications detailed below cannot be supplied by the domestic industry in commercial quantities in a timely manner. The petition requested that women's and girl's nightwear of such fabric assembled in one or more CBTPA beneficiary countries be eligible for preferential treatment under the CBTPA.

Specifications:

Fabric Description:	single knit jersey, jacquard geometric rib stitch
Petitioner Style No:	4934
HTS Subheading:	6006.32.00.80
Fiber Content:	64% polyester staple/34% cotton/2% spandex
Weight:	6.165 sq. meters/kg
Yarn Size:	54.14 metric (32/1 English), spun, filament core
Gauge:	24
Finish:	(Piece) dyed
Stretch Characteristics:	45% from relaxed state; 95% recovery to relaxed state

On September 8, 2004, CITA published a **Federal Register** notice requesting public comments on the request, particularly with respect to whether these fabrics can be supplied by the domestic industry in commercial quantities in a timely manner. On September 24, 2004, CITA and the Office of the U.S. Trade Representative offered to hold consultations with the relevant Congressional committees. We also requested the advice of the U.S. International Trade Commission and the relevant Industry Trade Advisory Committees.

Given the information in the ITC report and provided by the domestic industry for this and three subsequent petitions on similar products, CITA finds that there is domestic capacity and ability to supply 24-gauge circular knit fabric. During the review of the final petition, CITA uncovered information that there are several domestic suppliers capable of providing 24-gauge circular knit fabric. Follow-up calls made by a CITA representative confirmed that there are at least two U.S. companies who have 24-gauge knitting machines and state they have the ability to make the subject 24-gauge fabric in commercial quantities and in a timely manner.

On the basis of currently available information and our review of this request, CITA has determined that the domestic industry can supply the subject fabric described above in commercial quantities in a timely manner. Jaclyn's request is denied.

D. Michael Hutchinson,

Acting Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 04–28717 Filed 12–30–04; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF DEFENSE

Office of the Secretary

Submission for OMB Review; Comment Request

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

DATES: Consideration will be given to all comments received by February 2, 2005.

Title, Form, and OMB Number: Nomination for Appointment to the United States Military Academy, Naval Academy, and Air Force Academy; DD Form 1870; OMB Number 0701–0026.

Type of Request: Extension.

Number of Respondents: 16,200.

Responses Per Respondent: 1.

Annual Responses: 16,200.

Average Burden Per Response: 30 minutes.

Annual Burden Hours: 8,100.

Needs and Uses: The information collection requirement is necessary in order to receive nominations from all Members of Congress, the Vice President, Delegates to Congress, and the Governor and Resident Commissioner of Puerto Rico annually to each of the three service academies, as legal nominating authorities. This information collection that results in appointments made to the academies is in compliance with 10 U.S.C. 4342, 6954, 9342, and 32 CFR part 901. The completed form provides the required information for a nomination to be processed.

Affected Public: Individuals or households.

Frequency: On occasion.

Respondent's Obligation: Required to obtain or retain benefits.

OMB Desk Officer: Mr. Lewis Oleinick.

Written comments and recommendations on the proposed information collection should be sent to Mr. Oleinick at the Officer of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503.

DoD Clearance Officer: Mr. Robert Cushing.

Written requests for copies of the information collection proposal should be sent to Mr. Cushing, WHS/ESCD/Information Management Division, 1225 South Clark Street, Suite 504, Arlington, VA 22202–4326.

Dated: December 23, 2004.

Jeannette Owings-Ballard,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 04–28645 Filed 12–30–04; 8:45 am]

BILLING CODE 5001–06–M

DEPARTMENT OF DEFENSE

Department of the Navy

Notice of Availability of Government-Owned Inventions; Available for Licensing

AGENCY: Department of the Navy, DOD.

ACTION: Notice.

SUMMARY: The inventions listed below are assigned to the United States Government as represented by the Secretary of the Navy and are available for licensing by the Department of the Navy.

Navy Case No. 84,352: Spinel and Process for Making Same; Navy Case No. 96,775: Magnesium Aluminate Transparent Ceramic Having Low Scattering and Absorption Loss; Navy Case No. 96,921: LiF Coated Magnesium Aluminate.

ADDRESSES: Requests for copies of the inventions cited should be directed to the Naval Research Laboratory, Code 1004, 4555 Overlook Avenue, SW., Washington, DC 20375–5320, and must include the Navy Case number.

FOR FURTHER INFORMATION CONTACT: Jane F. Kuhl, Technology Transfer Office, NRL Code 1004, 4555 Overlook Avenue, SW., Washington, DC 20375–5320, telephone 202–767–7230. Due to temporary U.S. Postal Service delays, please fax 202–404–7920, e-mail: *kuhl@utopia.nrl.navy.mil* or use courier delivery to expedite response.

(Authority: 35 U.S.C. 207, 37 CFR part 404.)

Dated: December 27, 2004.

J.H. Wagshul,

Commander, Judge Advocate General's Corps, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. 04–28709 Filed 12–30–04; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF DEFENSE

Department of the Navy

Notice of Intent To Grant Exclusive Patent License; Radiant Images Incorporated

AGENCY: Department of the Navy, DOD.

ACTION: Notice.

SUMMARY: The Department of the Navy hereby gives notice of its intent to grant to Radiant Images Incorporated, a revocable, nonassignable, exclusive license in the United States to practice the Government-owned invention described in pending U.S. Patent Application, Ser. No. 10/614,426 entitled ''Silicon-On-Saphire Display Apparatus and Method of Fabricating Same''.

DATES: Anyone wishing to object to the granting of this license has (15) days from the date of this notice to file written objections along with supporting evidence, if any.

ADDRESSES: Written objections are to be filed with the Office of Patent Counsel, Space and Naval Warfare Systems Center, Code 20012, 53510 Silvergate Ave., Room 103, San Diego, CA 92152–5765.

FOR FURTHER INFORMATION CONTACT: Mr. Peter A. Lipovsky, Space and Naval Warfare Systems Center, Code 20012, 53510 Silvergate Ave., Room 103, San Diego, CA 92152–5765, telephone 619–553–3824.

(Authority: 35 U.S.C. 207, 37 CFR Part 404.7(a).)

Dated: December 27, 2004.

J.H. Wagshul,

Commander, Judge Advocate General's Corps, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. 04–28708 Filed 12–30–04; 8:45 am]

BILLING CODE 3810–FF–P

DELAWARE RIVER BASIN COMMISSION

Notice of Commission Meeting and Public Hearing

Notice is hereby given that the Delaware River Basin Commission will hold an informal conference followed by a public hearing on Wednesday, January 19, 2005. The hearing will be part of the Commission's regular business meeting. Both the conference session and business meeting are open to the public and will be held at the Delaware River Basin Commission's offices, 25 State Police Drive in West Trenton, New Jersey.

The conference among the commissioners and staff will begin at 9:30 a.m. Topics of discussion will include: response to the Athos I oil spill; staff recommendations on a proposal to amend the Water Quality Regulations, Water Code and Comprehensive Plan to classify the Lower Delaware River as Special Protection Waters; progress report on Stage 2 TMDLs for PCBs in the Delaware Estuary; report on the Delaware Estuary Science Conference of January 10–12, 2005; report on the Flow Management Technical Advisory Committee Work Group Meetings of November 9–10 and December 3, 2004 and January 6 and 18, 2005; and a proposed resolution to adopt the Commission's annual budget for the fiscal year ending June 30, 2005 and to apportion among the signatory parties the amounts required for support of the Commission's annual and operating budgets.

The subjects of the public hearing to be held during the 1 p.m. business meeting include the dockets listed below:

1. *Knoll, Inc. D–74–162–2.* An application to modify a wastewater treatment plant discharge for the Knoll Furniture Manufacturing Facility located off Water Street, approximately 1,000 feet northeast of its intersection with Peevy Road in Upper Hanover Township, Montgomery County, Pennsylvania. No new treatment facilities are proposed. A junction box at the sewage treatment plant will be repaired, and the facility will be rerated to include an additional 3,000 gallons of wastewater flow. Although the current docket provides for a flow of 0.07 million gallons per day (mgd), the wastewater treatment plant provides advanced treatment of a total flow of 0.073 mgd from sanitary, process and cooling water sources prior to discharge to Perkiomen Creek in the Schuylkill River Watershed.

2. *Alcoa Extrusions, Inc. D–82–5–3.* An application for the renewal of a ground water withdrawal project to reduce withdrawal from 21.6 million gallons per 30 days (mg/30 days) to 11.0 mg/30 days to supply the applicant's manufacturing facility from existing Wells Nos. 1 and 2 in the West Branch Schuylkill River Watershed. The project is located in Cressona Borough, Schuylkill County, Pennsylvania.

3. *Occidental Chemical Corporation D–83–9–2.* An application to amend the current docket, which provides for a discharge from the 0.3 million gallons per day (mgd) (design) industrial waste treatment plant (IWTP) to contain and treat mercury contaminated groundwater at the applicant's Delaware City chemical manufacturing plant located off State Route 9 in New Castle County, Delaware. Barrier walls have been constructed around the perimeter of the Process Area and Waste Lake 1. Contaminated groundwater from within these containments will be pumped at a maximum rate of 30 gallons per minute (43,200 gallons per day) for treatment at an activated carbon treatment system before being discharged to the existing IWTP for mercury removal. The IWTP discharge is to the Delaware River in Water Quality Zone 5.

4. *County of Chester D–83–15 CP–2.* An application to upgrade the applicant's existing 0.105 mgd sewage treatment plant (STP) from a secondary treatment facility to tertiary treatment with no increase in treatment capacity. The STP will continue to serve only the Pocopson Home and Prison. The STP is located approximately one-half mile north of the intersection of Route 52 and Wawaset Road in Pocopson Township, Chester County, Pennsylvania in the Pocopson Creek Watershed. The existing effluent spray field irrigation system will also be upgraded and no effluent discharge to surface water is proposed. (This docket was NAR'd as D–2004–7 CP.)

5. *Waste Management Disposal Services of Pennsylvania, Inc. D–88–54–2.* An application to modify a landfill leachate treatment plant discharge to the tidal Delaware River via a constructed discharge cove in Water Quality Zone 2. The treatment plant serves the Tullytown and GROWS Landfills and is located off Bordentown Road in Falls Township, Bucks County, Pennsylvania. The existing 0.1 million gallons per day leachate treatment plant utilizes the Best Available Treatment Technology but cannot consistently meet effluent total dissolved solids and color limits. The docket holder has requested modification of its docket to allow an increase in the average discharge concentration of Total Dissolved Solids to 10,000 mg/l from the current 6,560 mg/l and an increase in the maximum effluent limit for True Color to 1,500 units from the current 750 units on a platinum-cobalt scale. In support of its requested modifications, the docket holder has completed an environmental study that indicates the changes would result in no significant impact to the Delaware Estuary. No increase in

treatment plant capacity is proposed. The docket holder also proposes to construct two effluent storage tanks at the GROWS leachate treatment plant to replace an existing tank and seeks approval to haul non-hazardous leachate to a proposed transfer station that will reroute flow to the Morrisville Borough sewage treatment plant, just upstream on the tidal Delaware River within Water Quality Zone 2.

6. *Blue Ridge Real Estate Company D–91–46–2.* An application for the renewal of a surface water withdrawal project to continue withdrawal of 12 million gallons per 30 days to supply the applicant's proposed golf course at the Jack Frost Ski Area from an existing intake in the Tobyhanna Creek. The project is located in Kidder Township, Carbon County, Pennsylvania.

7. *Borough of Sellersville D–92–84 CP RENEWAL.* An application for the renewal of a ground water withdrawal project to continue withdrawal of 20.54 mg/30 days to supply the applicant's distribution system from existing Wells Nos. 1, 4, 5, and 6 in the Tohickon Creek and East Branch Perkiomen Creek Watersheds. The project is located in West Rockhill Township and the Borough of Sellersville, Bucks County, Pennsylvania and is located in the Southeastern Pennsylvania Ground Water Protected Area.

8. *The Premcor Refining Group, Inc. D–93–4–3.* An application to replace the withdrawal of water from Well No. P–9 in the applicant's water supply system, which has become an unreliable source of supply. The applicant requests withdrawal from replacement Well No. P–9A. No change in the total withdrawal from all wells—currently 180 million gallons per 30 days—is proposed. The project is located in the C&D Canal East, Dragon Run and Red Lion Creek Watersheds in Delaware City, New Castle County, Delaware.

9. *AMETEK U.S. Gauge Division D–93–25(G)–2.* An application for the renewal of a ground water withdrawal project to continue withdrawal of 3.88 million gallons per 30 days to supply the applicant's industrial facility and groundwater remediation project from existing Wells Nos. RW–1 and MW–6S and new Well No. MW–10S in the East Branch Perkiomen Creek Watershed. The project is located in Sellersville Borough, Bucks County, Pennsylvania within the Southeastern Pennsylvania Ground Water Protected Area.

10. *United Water Delaware D–96–50 CP–2.* An application for the renewal of a surface water withdrawal project to continue withdrawal of 30 million gallons per day (mgd) to provide supply to the applicant's public water distribution system, originally docketed under D–91–72 CP, and for a proposed revision to the operating plan of the tidal capture structure (TCS) originally docketed under D–96–50 CP. The applicant requests removal of the Q_{7-10} passby requirement when the natural stream flow is less than 17.2 mgd or chlorides immediately at the outlet of the TCS bypass structure downstream of the TCS are greater than 250 ppm. Surface water is withdrawn from the confluence of the White Clay Creek and Red Clay Creek at the Stanton Intake, and/or from the tidal backflow from the Christina River created by the TCS, via an intake at the TCS. The modification of the TCS operating plan is designed to increase water supply reliability during low flow conditions, attenuate brackish water impacts and maintain essential physical habitat at the tidal/freshwater interface controlled by the TCS. The TCS operating plan revision includes incremental passby flow targets in conjunction with salinity monitoring to protect the applicant's water supply and preserve depth of water downstream of the TCS for aquatic habitat protection. The project is located in New Castle County, Delaware.

11. *Plumstead Township D–97–33 CP–2.* An application for approval of a ground water withdrawal project to renew the allocation included in Docket D–94–43 P.A. and consolidate all other docket approvals for Plumstead Township, retaining the existing withdrawal from all wells of 15.31 million gallons per 30 days (mg/30 days). Docket D–97–33 CP–2 consolidates allocations approved under D–92–76 P.A., D–94–43 P.A., D–95–18 CP and D–97–33 CP. The project is located in the North Branch Neshaminy Creek, Geddes Run, Cabin Run and Pine Run Watersheds in Plumstead Township, Bucks County, Pennsylvania, within the Southeastern Ground Water Protected Area.

12. *Green-Waltz Water Company, Inc., Nestlé Waters North America Inc., D–98–55–2.* An application for approval of a ground water withdrawal project to supply up to 11.7 million gallons per 30 days (mg/30 days) of water for bulk water supply to the applicant's bottling plant from replacement Well B–1, screened in the unconsolidated deposits overlying the Martinsburg Formation. Well B–1 will replace Well 1 (also known as W–1). Green-Waltz Water Company, Inc. sold to Nestlé Waters North America Inc. (NWNA) its interests in waters from the spring sources located on the subject property, but remains a co-owner of the site and facilities. NWNA has assumed the role of operator of the facilities, and as such, has responsibility for the operation and maintenance of the withdrawal from Well B–1. The applicant has not requested a change in the existing allocation of 11.7 mg/30 days. The project is located in the Waltz Creek Watershed in Washington Township, Northampton County, Pennsylvania.

13. *Pennsylvania American Water Company D–99–30 CP 2.* An application for approval of a ground water withdrawal project to supply up to 5.83 million gallons per 30 days (mg/30 days) of water to the applicant's Glen Alsace public water supply distribution system from replacement Well GL–2A in the Brunswick Formation, and to retain the existing withdrawal from all wells at 50 mg/30 days. Proposed replacement Well No. GL–2A will replace former Well No. GL–2 and is planned to be used as a regular source to the Glen Alsace distribution system. The project also includes two existing interconnections from the Reading Area Water Authority (45 mg/30 days) and the Mount Penn Water Authority (6 mg/30 days). The project is located in the Antietam Creek Watershed in Exeter Township, Berks County, Pennsylvania.

14. *Lower Perkiomen Valley Regional Sewer Authority D–2001–42 CP–2.* An application to expand the Oaks Sewage Treatment Plant (STP) from 9.5 million gallons per day (mgd) to 14.25 mgd. The plant will continue to provide advanced secondary treatment via an anoxic/oxic biological process. The Oaks STP is located at the confluence of Perkiomen Creek and the Schuylkill River in Upper Providence Township, Montgomery County, PA. The project will continue to serve portions of Upper Providence, Perkiomen and Skippack Townships, plus Collegeville and Trappe Boroughs, all in Montgomery County, PA. STP effluent will continue to be discharged to the Schuylkill River through the existing outfall. (This docket was NAR'd as D–2004–20 CP.)

15. *Little Washington Wastewater Company D–2001–54–2.* An application to expand a 0.12 million gallon per day (mgd) sewage treatment plant (STP) to process 0.155 mgd on a maximum monthly basis, while maintaining tertiary level of treatment. The plant is located just south of Little Washington-Lyndell Road in East Brandywine Township, Chester County, Pennsylvania. Currently, up to 53,100 gallons per day (gpd) of STP effluent is discharged to Culbertson Run in the Brandywine Creek Watershed and up to 66,133 gpd to effluent disposal beds that recharge the ground water table. The additional effluent from the proposed expansion will be routed back to the proposed Hideaway Farm subdivision

for application to new disposal beds. The proposed expansion will enable the applicant to serve additional residential development in East Brandywine Township.

16. *Pennsylvania-American Water Company D–2003–6 CP–1.* An application for approval of a ground water withdrawal project to supply up to 5.616 mg/30 days of water to the applicant's Country Club of the Poconos at Big Ridge distribution system from new Wells Nos. 3 and 5 in the Mahatango Formation, and to increase the existing withdrawal from all wells to 9.316 mg/30 days. The project is located in the Pond Creek Watershed in Middle Smithfield Township, Monroe County, Pennsylvania in the drainage area of the Special Protection Waters. (This docket was NAR'd as D–2003–6 CP.)

17. *Air Products and Chemicals, Inc. D–2004–27–1.* An application for an existing industrial wastewater treatment plant to process up to 0.135 million gallons per day and to continue to discharge to the Lehigh River through an existing outfall. No modification of the existing plant or increase in flow is proposed. The applicant is a manufacturing facility located in the Borough of Glendon, Northampton County, Pennsylvania, in the area covered by the Lower Delaware River Management Plan.

18. *The Glass Group, Inc. D–2004–29–1.* An application for approval of a ground water withdrawal project to supply up to 30 million gallons per thirty days (mg/30 days) of water to the applicant's manufacturing facility from Wells Nos. 13, 14, 15 and 16 in the Cohansey Formation. The project is located in the Maurice River Watershed in the City of Millville, Cumberland County, New Jersey.

19. *Warren Investments, LLC D–2004–31–1.* An application for approval of a ground water withdrawal project to supply up to 6.91 million gallons per 30 days of water for supplemental irrigation of the applicant's proposed Shetland Crossing Golf Club from new Wells WIA, WIB, WIC and WID, all in the Lockatong Formation. In conjunction with the ground water withdrawal, the golf course will utilize supplemental irrigation from stormwater collected in four on-site storage ponds. The project is located in the Wickecheoke Creek Watershed in Franklin Township, Hunterdon County, New Jersey.

20. *Bear Creek Management Company, LLC D–2004–35–1.* An application for approval of a ground water and surface water withdrawal project to supply up to 11 million gallons per 30 days (mg/30 days) of water to the applicant's ski resort from new Wells Nos. 1, 2, 3, 4, 5 and 6 and up to 36 mg/30 days of water to the applicant's snowmaking operations from 4 ponds and 1 detention basin and to limit the withdrawal from all sources to 36.6 mg/30 days. The project is located in the Swabia Creek Watershed in Longswamp Township, Berks County, Pennsylvania.

21. *Borough of Portland D–2003–9 CP.* An application to construct a 0.105 million gallon per day (mgd) wastewater treatment plant to provide tertiary treatment of flow from the proposed Portland Industrial Park and from local on-lot septic systems located in Portland Borough, Northampton County, Pennsylvania. The plant will be constructed in the southeast corner of Portland Borough and the project outfall will discharge to the Delaware River. This location is in DRBC Water Quality Zone 1D and in the drainage area of the Lower Delaware Management Plan.

In addition to the public hearing on the dockets listed above, the Commission's 1 p.m. business meeting will include a public hearing and possible action on a resolution to amend Resolution No. 2002–33 relating to the operation of Lake Wallenpaupack during drought watch, drought warning and drought operations; a resolution to amend the Commission's administrative procedure and fee schedule for renewal of project approvals under Section 3.8 and Article 10 of the Delaware River Basin Compact; a resolution to amend the Water Quality Regulations, Water Code and Comprehensive Plan to designate the Lower Delaware River as Special Protection Waters; a resolution authorizing the Executive Director to extend the Commission's contract with Axys Analytical Laboratories, Inc. for analytical services in connection with the control of toxic substances in the Delaware Estuary; a resolution authorizing the executive director to engage a contractor to assist the Commission staff with tasks to be completed under Pennsylvania Act 220; and a resolution to adopt the Commission's annual budget for the fiscal year ending June 30, 2005 and to apportion among the signatory parties the amounts required for support of the Commission's annual and operating budgets.

In addition, the meeting will include: adoption of the Minutes of the October 27, 2004 business meeting; announcements; a report on Basin hydrologic conditions; a report by the executive director; a report by the Commission's General Counsel; and an opportunity for public dialogue. Draft dockets and the resolutions scheduled for public hearing on January 19, 2005 will be posted on the Commission's Web site, *http://www.drbc.net*, where they can be accessed through the Notice of Commission Meeting and Public Hearing. Additional documents relating to the dockets and other items may be examined at the Commission's offices. Please contact William Muszynski at 609–883–9500 ext. 221 with any docket-related questions.

Individuals in need of an accommodation as provided for in the Americans with Disabilities Act who wish to attend the informational meeting, conference session or hearings should contact the Commission Secretary directly at 609–883–9500 ext. 203 or through the Telecommunications Relay Services (TRS) at 711, to discuss how the Commission may accommodate your needs.

Dated: December 27, 2004.

Pamela M. Bush,

Commission Secretary.

[FR Doc. 04–28689 Filed 12–30–04; 8:45 am]

BILLING CODE 6360–01–P

DEPARTMENT OF EDUCATION

Submission for OMB Review; Comment Request

AGENCY: Department of Education.

SUMMARY: The Director, Regulatory Information Management Services, Office of the Chief Information Officer invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before February 2, 2005.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Carolyn Lovett, Desk Officer, Department of Education, Office of Management and Budget, 725 17th Street, NW., Room 10235, New Executive Office Building, Washington, DC 20503 or faxed to (202) 395–6974.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its

statutory obligations. The Director, Regulatory Information Management Services, Office of the Chief Information Officer, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, *e.g.* new, revision, extension, existing or reinstatement; (2) title; (3) summary of the collection; (4) description of the need for, and proposed use of, the information; (5) respondents and frequency of collection; and (6) reporting and/or recordkeeping burden. OMB invites public comment.

Dated: December 28, 2004.

Jeanne Van Vlandren,

Director, Regulatory Information Management Services, Office of the Chief Information Officer.

Institute of Education Sciences

Type of Review: Extension.

Title: IEA Progress in International Reading Literacy Study (PIRLS).

Frequency: One time.

Affected Public:

Individuals or household; State, local, or tribal gov't, SEAs or LEAs.

Reporting and Recordkeeping Hour Burden:

Responses: 875.

Burden Hours: 1,082.

Abstract: PIRLS 2006 is a multi-national project coordinated by the International Association for the Evaluation of Educational Achievement. Approximately 46 countries will participate in this analysis of children's reading literacy and the factors associated with reading acquisition. Children in grade 4 in the U.S. will be administered a reading test and the children, their teachers, and school administrators will also complete questionnaires about factors related to the development of reading literacy.

Requests for copies of the submission for OMB review; comment request may be accessed from *http://edicsweb.ed.gov,* by selecting the ''Browse Pending Collections'' link and by clicking on link number 2634. When you access the information collection, click on ''Download Attachments ''to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., Potomac Center, 9th Floor, Washington, DC 20202–4700. Requests may also be electronically mailed to the Internet address *OCIO_RIMG@ed.gov* or faxed to 202–245–6621. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be directed to Kathy Axt at her e-mail address *Kathy.Axt@ed.gov.* Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. E4–3913 Filed 12–30–04; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Submission for OMB Review; Comment Request

AGENCY: Department of Education.

SUMMARY: The Director, Regulatory Information Management Services, Office of the Chief Information Officer invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before February 2, 2005.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Carolyn Lovett, Desk Officer, Department of Education, Office of Management and Budget, 725 17th Street, NW., Room 10235, New Executive Office Building, Washington, DC 20503 or faxed to (202) 395–6974.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Director, Regulatory Information Management Services, Office of the Chief Information Officer, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, *e.g.* new, revision, extension, existing or reinstatement; (2) title; (3) summary of the collection; (4) description of the need for, and proposed use of, the information; (5) respondents and frequency of collection; and (6) reporting and/or recordkeeping burden. OMB invites public comment.

Dated: December 28, 2004.

Jeanne Van Vlandren,

Director, Regulatory Information Management Services, Office of the Chief Information Officer.

Institute of Education Sciences

Type of Review: Extension.

Title: Program for International Student Assessment (PISA).

Frequency: One time.

Affected Public:

Individuals or household; State, local, or tribal gov't, SEAs or LEAs.

Reporting and Recordkeeping Hour Burden:

Responses: 1,607.

Burden Hours: 1,017.

Abstract: The Program for International Student Assessment (PISA) is a new system of international assessments that focus on 15-year-olds' capabilities in reading literacy, mathematics literacy, and science literacy. PISA 2000 was the first cycle of PISA, which will be conducted every three years, with a primary focus on one area for each cycle. PISA 2000 focuses on reading literacy; mathematics literacy will be the focus in 2003, and science literacy in 2006. In addition to assessment data, PISA provides background information on school context and student demographics to benchmark performance and inform policy.

Requests for copies of the submission for OMB review; comment request may be accessed from *http://edicsweb.ed.gov*, by selecting the ''Browse Pending Collections'' link and by clicking on link number 2633. When you access the information collection, click on ''Download Attachments'' to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., Potomac Center, 9th Floor, Washington, DC 20202–4700. Requests may also be electronically mailed to the Internet address *OCIO_RIMG@ed.gov* or faxed to 202–245–6621. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be directed to Kathy Axt at her e-mail address *Kathy.Axt@ed.gov*. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. E4–3914 Filed 12–30–04; 8:45 am]

BILLING CODE 4000–01–P

FEDERAL COMMUNICATIONS COMMISSION

Public Information Collection(s) Approved by Office of Management and Budget

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: The Federal Communications Commission has received approval from the Office of Management and Budget (OMB) for the public information collection, OMB Control Number 3060–0185, Section 73.3613, Filing of Contracts. The approval was received on December 21, 2004.

DATES: Effective December 21, 2004.

FOR FURTHER INFORMATION CONTACT: Erin Dozier, Media Bureau, (202) 418–7200.

SUPPLEMENTARY INFORMATION: The Federal Communications Commission has received OMB approval for OMB Control Number 3060–0185. The effective date for this collection is December 21, 2004. The expiration date is May 31, 2005. Pursuant to the Paperwork Reduction Act of 1995, Public Law 104–13, an agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. Notwithstanding any other provisions of law, no person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Questions concerning these revised information collections should be directed to Cathy Williams, Federal Communications Commission, (202) 418–2918 or via the Internet at *Cathy.Williams@fcc.gov*.

Federal Communications Commission.

William F. Caton,

Deputy Secretary.

[FR Doc. 04–28742 Filed 12–30–04; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[DA 04–3982]

Fourth Meeting of the Advisory Committee for the 2007 World Radiocommunication Conference (WRC–07 Advisory Committee)

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: In accordance with the Federal Advisory Committee Act, this notice advises interested persons that the fourth meeting of the WRC–07 Advisory Committee will be held on February 23, 2005, at the Federal Communications Commission. The purpose of the meeting is to continue preparations for the 2007 World Radiocommunication Conference. The Advisory Committee will consider any preliminary views and/or proposals introduced by the Advisory Committee's Informal Working Groups.

DATES: February 23, 2005; 10 a.m.–12 noon.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW., Room TW–C305, Washington DC 20554.

FOR FURTHER INFORMATION CONTACT: Alexander Roytblat, FCC International Bureau, Strategic Analysis and Negotiations Division, at (202) 418–7501.

SUPPLEMENTARY INFORMATION: The Federal Communications Commission (FCC) established the WRC–07 Advisory Committee to provide advice, technical support and recommendations relating to the preparation of United States proposals and positions for the 2007 World Radiocommunication Conference (WRC–07).

In accordance with the Federal Advisory Committee Act, Public Law 92–463, as amended, this notice advises interested persons of the fourth meeting of the WRC–07 Advisory Committee. The WRC–07 Advisory Committee has an open membership. All interested parties are invited to participate in the Advisory Committee and to attend its meetings. The proposed agenda for the fourth meeting is as follows:

Agenda

Fourth Meeting of the WRC–07 Advisory Committee, Federal Communications Commission, 445 12th Street, SW., Room TW–C305, Washington, DC 20554.

February 23, 2005; 10 a.m.–12 noon

1. Opening Remarks
2. Approval of Agenda
3. Approval of the Minutes of the Third Meeting
4. Reports on Recent WRC–07 Preparatory Meetings
5. NTIA Draft Preliminary Views and Proposals
6. Informal Working Group Reports and Documents Relating to:
   a. Consensus Views and Issues Papers
   b. Draft Proposals
7. Future Meetings
8. Other Business

Federal Communications Commission.

Don Abelson,

Chief, International Bureau.

[FR Doc. 04–28741 Filed 12–30–04; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[WT Docket No. 03–187; DA 04–3891; DA 04–4021]

Migratory Birds Notice of Inquiry Proceeding

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: The document gives parties an opportunity to comment on a report that Avatar Environmental, LLC, prepared as part of the Federal Communications Commission's Migratory Birds Notice of Inquiry proceeding. Avatar's report is entitled *Notice of Inquiry Comment Review Avian/Communication Tower Collisions, Final, Prepared for Federal Communications Commission*. The public notice also sets forth the due dates for the filing of comments and reply comments.

DATES: Comments are due February 14, 2005. Reply comments are due March 14, 2005.

ADDRESSES: *See* **SUPPLEMENTARY INFORMATION** for filing instructions.

FOR FURTHER INFORMATION CONTACT: Louis Peraertz, Spectrum and Competition Policy Division, Wireless Telecommunications Bureau, Federal Communications Commission, (202) 418–1879.

SUPPLEMENTARY INFORMATION:

Background About the Migratory Birds NOI Proceeding and Avatar's Report

On August 20, 2003, the Commission released a Notice of Inquiry (NOI), *In the Matter of Effects of Communications Towers on Migratory Birds,* 68 FR 53696, September 12, 2003, to develop a record on how, and to what extent, migratory birds may be affected by our nation's communications infrastructure. The NOI sought comment on existing scientific research concerning the number of migratory bird collisions with communications towers and the role that specific factors, such as lighting, height and type of antenna structure, weather, location, physiographic features of sites, and migration paths, may have in increasing or decreasing the incidence of such collisions. A number of parties filed comments in which they referred to scientific studies of past incidents of migratory birds colliding with communications towers.

To help the Commission evaluate these scientific studies, the Commission retained Avatar Environmental, LLC, (Avatar) an environmental risk

consulting firm. After reviewing the scientific studies referred to by the comments and reply comments, Avatar submitted a report of its findings, entitled *Notice of Inquiry Comment Review Avian/Communication Tower Collisions, Final, Prepared for Federal Communications Commission.* The public notice gives parties an opportunity to comment on Avatar's report.

Parties who choose to file by paper must file an original and four copies of each filing. All filings by mail (including U.S. Postal Service Express Mail, Priority Mail, and First Class Mail) must be sent to the Commission's Secretary, Marlene H. Dortch, Federal Communications Commission, Office of the Secretary, 445 12th Street, SW., Washington DC 20054.

All filings sent to the Commission by overnight delivery, *e.g.,* Federal Express (other than by U.S. Postal Service Express Mail and Priority Mail), must be sent to the Commission's Secretary, Marlene H. Dortch, Federal Communications Commission, Office of the Secretary, 9300 East Hampton Drive, Capitol Heights, MD 20743.

All hand-delivered or messenger-delivered filings must be delivered to the Commission's filing location at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002–4913. The filing hours at this facility are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.

Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Information Center, Federal Communications Commission, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. The **SUPPLEMENTARY INFORMATION** section has instructions on how to review these documents electronically.

Additional Instructions for Filing and Reviewing Documents

Parties who choose to file by paper should also submit their comments on diskette to: Louis Peraertz, Spectrum and Competition Policy Division, Wireless Telecommunications Bureau, Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554. The required diskette copies of submissions should be on 3.5-inch diskettes formatted in an IBM-compatible format using Microsoft Word or compatible software. Each diskette should be accompanied by a cover letter and should be submitted in ''read only'' mode. The diskette should be clearly labeled with the commenter's name, proceeding, type of pleading (comment or reply comment), date of submission, and the name of the electronic file on the diskette. The label should also include the following phrase ''Disk Copy—Not an Original.'' Each diskette should contain only one party's pleadings, preferably in a single electronic file. In addition, commenters must send diskette copies to the Commission's copy contractor, Best Copy and Printing, Inc., 445 12th Street, SW., CY–B402, Washington, DC 20554.

Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. Given recent changes in the Commission's mail delivery system, parties are strongly urged to use the ECFS to file their pleadings. Comments filed through the ECFS can be sent as an electronic file via the Internet to *http://www.fcc.gov/e-file/ecfs.html.* Generally, only one copy of an electronic submission must be filed. In completing the transmittal screen, electronic filers should include their full name, Postal Service mailing address, and the applicable docket number. Parties may also submit an electronic comment by Internet e-mail. To receive filing instructions for e-mail comments, commenters should send an e-mail to *ecfs@fcc.gov,* and should include the following words in the body of the message, ''get form <your e-mail address>.'' A sample form and directions will be sent in reply.

These documents also will be available electronically from the Commission's Electronic Comment Filing System. Copies of filings in this proceeding may be obtained from Best Copy and Printing, Inc., Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone (202) 863–2893, facsimile (202) 863–2898, or via e-mail at *http://www.bcpiweb.com.* To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0531 (voice), 202–418–7365 (tty).

Federal Communications Commission.

William W. Kunze,

Chief, Spectrum and Competition Policy Division, Wireless Telecommunications Bureau.

[FR Doc. 04–28652 Filed 12–30–04; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center website at *www.ffiec.gov/nic/.*

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than January 27, 2005.

A. Federal Reserve Bank of Cleveland (Cindy C. West, Banking Supervisor) 1455 East Sixth Street, Cleveland, Ohio 44101–2566:

1. S&T Bancorp, Inc., Indiana, Pennsylvania; to acquire up to 9.9 percent of the voting shares of IBT Bancorp, Inc., Irwin, Pennsylvania, and thereby indirectly acquire Irwin Bank & Trust Company, Irwin, Pennsylvania.

Board of Governors of the Federal Reserve System, December 27, 2004.

Jennifer J. Johnson,

Secretary of the Board.

[FR Doc. 04–28672 Filed 12–30–04; 8:45 am]

BILLING CODE 6210–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

[Document Identifier: OS–0990–New]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Office of the Secretary.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Type of Information Collection Request: New collection, regular;

Title of Information Collection: Adolescent Family Life Core Evaluation;

Form/OMB No.: OS–0990–New;

Use: The Office of Adolescent Pregnancy Programs (OAPP) has developed core data collection tools to assist programs that have received Adolescent Family Life (AFL) demonstration grants with evaluating the programs and services provided as a part of their grant activities. These would be available to support both its prevention and care demonstration projects. The data collection tool for AFL prevention grantees will provide information on grantee progress in three areas: reducing sexual risk behaviors, strengthening parents and families, and strengthening school and community supports.

Frequency: Reporting, annually;

Affected Public: Individuals or households, not-for-profit institutions;

Annual Number of Respondents: 6,300;

Total Annual Responses: 6,300;

Average Burden Per Response: 1 hour;

Total Annual Hours: 12,600;

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access the HHS Web site address at *http://www.hhs.gov/oirm/infocollect/pending/* or e-mail your request, including your address, phone number, OMB number, and OS document identifier, to *naomi.cook@hhs.gov,* or call the Reports Clearance Office on (202) 690–6162. Written comments and recommendations for the proposed information collections must be mailed within 60 days of this notice directly to the OS Paperwork Clearance Officer designated at the following address: Department of Health and Human Services, Office of the Secretary, Assistant Secretary for Budget, Technology, and Finance, Office of Information and Resource Management, Attention: Naomi Cook (0990–New), Room 531–H, 200 Independence Avenue, SW., Washington, DC 20201.

Dated: December 22, 2004.

Robert E. Polson,

Office of the Secretary, Paperwork Reduction Act Reports Clearance Officer.

[FR Doc. 04–28646 Filed 12–30–04; 8:45 am]

BILLING CODE 4168–17–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

[Document Identifier: OS–4040–XXXX–]

Emergency Clearance: Public Information Collection Requirements; Notice of Proposed Requirement to Establish Government-Wide Standard Data Elements for Use by All Federal Grant Making Agencies—Mandatory Grant Applications

AGENCY: Office of the Secretary, Grants.gov Program Management Office.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

1. Type of Information Collection Request: Emergency Clearance;

Title of Information Collection: SF–424 Mandatory (M);

Form/OMB No.: OS–4040–XXXX–;

Use: The SF–424(M) will become the government-wide data set for applications, plans, and related submissions under mandatory grant programs. Federal agencies and applicants/recipients under mandatory grant programs will use the standard data set and definitions for paper and electronic applications/plans/related submissions. At this time, the Federal agencies are proposing a set of data elements to be used as cover information. Additional standard data elements for other components of an application/plan, *e.g.,* a standard budget, may be proposed at a later date.

The proposed standard data set will replace numerous agency data sets and reduce the administrative burden placed on the grants community. Federal agencies will not be required to collect all of the information included in the proposed data set. The agency will identify the data that must be provided by applicants through instructions that will accompany the application package.

Frequency: Recordkeeping, application, and on occasion;

Affected Public: Federal, State, local, or tribal governments, farms, and not for profit institutions;

Annual Number of Respondents: 1,161;

Total Annual Responses: 21,900;

Average Burden Per Response: 1 hour;

Total Annual Hours: 21,900;

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access the HHS Web site address at *http://www.hhs.gov/oirm/infocollect/pending/* or e-mail your request, including your address, phone number, OMB number, and OS document identifier, to *naomi.cook@hhs.gov,* or call the Reports Clearance Office on (202) 690–6162. Written comments and recommendations for the proposed information collections must be mailed by January 21, 2004, directly to the OS Paperwork Clearance Officer designated at the following address: Department of Health and Human Services, Office of the Secretary, Assistant Secretary for Budget, Technology, and Finance, Office of Information and Resource Management, Attention: Naomi Cook (4040–XXXX), Fax Number (202) 690–8715, Room 531–H, 200 Independence Avenue, SW., Washington, DC 20201.

Dated: December 22, 2004.

Robert E. Polson,

Office of the Secretary, Paperwork Reduction Act Reports Clearance Officer.

[FR Doc. 04–28647 Filed 12–30–04; 8:45 am]

BILLING CODE 4168–17–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

[Document Identifier: OS–0990–New]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Office of the Secretary.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

#1 Type of Information Collection Request: New Collection, regular;

Title of Information Collection: Evaluation of HIV Prevention Program in Women;

Form/OMB No.: OS–0990–New;

Use: The Office on Women's Health (OWH) is seeking a new clearance to conduct data collection activities associated with the evaluation of funded programs. The evaluation is designed to determine best practices and clearly define the gender-centered approach to HIV/AIDS prevention. The HIV/AIDS programs to be evaluated are the Model Mentorship. Incarcerated/Newly released women and HIV prevention in the rural south. The program consists of individual community-based organizations from across the country. The evaluation results will assess the effectiveness of OWH reaching its overarching HIV program goals of increasing HIV prevention knowledge and reducing the risk of contacting HIV among young minority women.

Frequency: Reporting, quarterly;

Affected Public: Individuals or households, business or other for-profit, not-for-profit institutions;

Annual Number of Respondents: 260;

Total Annual Responses: 260;

Average Burden Per Response: 1 hour;

Total Annual Hours: 147.5

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access the HHS Web site address at *http://www.hhs.gov/oirm/infocollect/pending/* or e-mail your request, including your address, phone number, OMB number, and OS document identifier, to *naomi.cook@hhs.gov,* or call the Reports Clearance Office on (202) 690–6162. Written comments and recommendations for the proposed information collections must be mailed within 60 days of this notice directly to the OS Paperwork Clearance Officer designated at the following address: Department of Health and Human Services, Office of the Secretary, Assistant Secretary for Budget, Technology, and Finance, Office of Information and Resource Management, Attention: Naomi Cook (0990–New), Room 531–H, 200 Independence Avenue, SW., Washington DC 20201.

Dated: December 21, 2004.

Robert E. Polson,

Office of the Secretary, Paperwork Reduction Act Reports Clearance Officer.

[FR Doc. 04–28648 Filed 12–30–04; 8:45 am]

BILLING CODE 4168–17–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Committee on Vital and Health Statistics: Meeting

Pursuant to the Federal Advisory Committee Act, the Department of Health and Human Services (HHS) announces the following advisory committee meeting.

Name: National Committee on Vital Health Statistics (NCVHS), Workgroup on the National Health Information Infrastructure (NHII).

Time and Date: 9 a.m.–5 p.m., January 5, 2005; 9 a.m.–4 p.m. January 6, 2005.

Place: Hubert H. Humphrey Building, 200 Independence Avenue SW., Room 705A, Washington, DC 20201.

Status: Open.

Purpose: The Workgroup will meet to discuss and hear testimony from invited experts on policy issues related to sponsorship of personal health records (PHRs), and to explore (1) consumer and patient perspectives on personal health records; (2) provider-based barriers to provider adoption; and, (3) the business case for PHRs and the related business issues.

For Further Information Contact: Substantive program information as well as summaries of meetings and a roster of committee members may be obtained from Mary Jo Deering, Lead Staff Person for the NCVHS Workgroup on the National Health Information Infrastructure, Director for Informatics Dissemination, NCI Center for Bioinformatics, National Cancer Institute, National Institutes of Health, USDHHS, 6116 Executive Boulevard—#400, Rockville, MD 20852, Phone: (301) 594–1273, Fax: (301) 480–3441, E-mail: *deeringm@mail.nih.gov* or Marjorie S. Greenberg, Executive Secretary, NCVHS, National Center for Health Statics, Centers for Disease Control and Prevention, 3311 Toledo Road, Room 2402, Hyattsville, Maryland 20782, telephone (301) 458–4245. Information also is available on the NCVHS home page of the HHS Web site: *http://www.ncvhs.hhs.gov/,* where an agenda for the meeting will be posted when available.

Should your require reasonable accommodation, please contact the CDC Office of Equal Employment Opportunity on (301) 458–4EEO (4336) as soon as possible.

Dated: December 14, 2004.

James Scanlon,

Acting Deputy Assistant Secretary for Science and Data Policy, Office of the Assistant Secretary for Planning and Evaluation.

[FR Doc. 04–28737 Filed 12–30–04; 8:45 am]

BILLING CODE 4151–04–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[Funding Opportunity Number: CE05–024]

Community-Based Interventions for Alcohol-Impaired Driving; Notice of Availability of Funds—Amendment

A notice announcing the availability of fiscal year (FY) 2005 funds for cooperative agreements to conduct a research program to evaluate interventions to decrease alcohol-impaired driving in community settings and the resulting deaths and injuries was published in the **Federal Register** on November 19, 2004, Vol. 69, No. 223, pages 67738–67744. The notice is amended as follows to remove the requirement for submission of Letters of Intent (LOI):

On page 67740, column 1, in the third bullet of Special Requirements, change the first sentence to read ''In order to plan the application review more effectively and efficiently, CDC requests that you submit a Letter of Intent (LOI) to apply for this program.''

On page 67741, column 1, in section IV.3. Submission Dates and Times, remove the one-sentence paragraph under Letter of Intent (LOI): December 20, 2004.

Dated: December 23, 2004.

William P. Nichols,

Director, Procurement and Grants Office, Centers for Disease Control and Prevention.

[FR Doc. 04–28661 Filed 12–30–04; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[Funding Opportunity Number: CE05–029]

Dissemination Research on Fall Prevention: Development and Testing of an Exercise Program Package To Prevent Older Adult Falls; Notice of Availability of Funds—Amendment

A notice announcing the availability of fiscal year (FY) 2005 funds for cooperative agreements to conduct a research program on translating an exercise intervention that rigorous research has shown is effective in reducing falls among older adults into a program; testing implementation of the program in a community setting; and conducting dissemination research focusing on reach, uptake, feasibility, fidelity of the implementation, and acceptability was published in the **Federal Register** on November 8, 2004, Vol. 69, No. 215, pages 64762–64769. The notice is amended as follows to remove the requirement for submission of Letters of Intent (LOI):

On page 64764, column 3, section III.3. Other, Special Requirements, in the second bullet change the first sentence to read ''In order to plan the application review more effectively and efficiently, CDC requests that you submit a Letter of Intent (LOI) to apply for this program.''

On page 64765, column 3, section IV.3. Submission Dates and Times, remove the one-sentence paragraph under Letter of Intent (LOI): December 8, 2004.

Dated: December 23, 2004.

William P. Nichols,

Director, Procurement and Grants Office, Centers for Disease Control and Prevention.

[FR Doc. 04–28660 Filed 12–30–04; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–10112, CMS–R–218]

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services, is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

1.*Type of Information Collection Request:* New collection; *Title of Information Collection:* Phone Surveys of Product/Service for Medicare Payment Validation and Supporting Regulations in 42 CFR 405.502; *Form No.:* CMS–10112 (OMB# 0938–NEW); *Use:* This collection will be used to identify specific Medicare Part B products/services provided to Medicare beneficiaries and the costs associated with the provision of those products/services. The information collected will be used to validate the Medicare payment amounts for those products/services and institute revisions of payment amounts where necessary. The respondents will be the companies that have provided the product/service under review to Medicare beneficiaries.; *Frequency:* On occasion; *Affected Public:* Business or other for-profit; *Number of Respondents:* 2,000; *Total Annual Responses:* 2,000; *Total Annual Hours:* 16,000.

2.*Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* ICRS Contained in 45 CFR Part 162; HIPAA Standards for Electronic Transactions; *Use:* This submission contains information collection requirements in HCFA–0149–F, CMS–0003–P, CMS–0005–P, and CMS–003/005–F. This collection establishes standards for electronic transactions and for code sets to be used in those transactions. The collection standardizes the approximately 400 formats of electronic health care claims used in the United States. The use of these standards significantly reduces the administrative burden associated with paper documents, lowers operating costs, and improves data quality for health care providers and health plans; *Form Number:* CMS–R–218 (OMB# 0938–0866); *Frequency:* On occasion; *Affected Public:* Business or other for-profit; *Number of Respondents:* 3.4 million; *Total Annual Responses:* 3.4 million; *Total Annual Hours:* 1 hour.

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access CMS Web site address at *http://www.cms.hhs.gov/regulations/pra/*, or e-mail your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov,* or call the Reports Clearance Office on (410) 786–1326. Written comments and recommendations for the proposed information collections must be mailed within 30 days of this notice directly to the OMB desk officer: OMB Human Resources and Housing Branch, Attention: Christopher Martin, New Executive Office Building, Room 10235, Washington, DC 20503.

Dated: December 23, 2004.

John P. Burke, III,

CMS Paperwork Reduction Act Reports Clearance Officer, Office of Strategic Operations and Regulatory Affairs, Regulations Development Group.

[FR Doc. 04–28649 Filed 12–30–04; 8:45 am]

BILLING CODE 4120–03–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2004N–0539]

Establishing a Docket for the Development of Plasma Standards Public Workshop; Notice

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the opening of a docket to receive information and comments on the August 31 and September 1, 2004,

public workshop entitled ''Development of Plasma Standards'' (the workshop). We are opening the docket to gather additional information from interested parties on the subjects of plasma collection, freezing, and storage, and for interested parties to provide comments on the presentations and discussions that took place during the workshop.

DATES: Submit written or electronic comments on the workshop, related regulatory and scientific issues, and comments on information submitted to the docket by other interested parties by July 5, 2004.

ADDRESSES: Submit written comments and information regarding the workshop to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852–1448. Submit electronic comments or information to *http://www.fda.gov/dockets/ecomments*. See the **SUPPLEMENTARY INFORMATION** section for electronic and other access to the slide presentations and transcripts from the workshop.

FOR FURTHER INFORMATION CONTACT: Stephen M. Ripley, Center for Biologics Evaluation and Research (HFM–17), Food and Drug Administration, 1401 Rockville Pike, suite 200N, Rockville, MD 20852–1448, 301–827–6210.

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of August 9, 2004 (69 FR 48250), we published a notice to announce a public workshop entitled ''Development of Plasma Standards.'' On August 31 and September 1, 2004, we held the workshop to address regulatory and scientific issues about currently licensed plasma products and unlicensed recovered plasma that is fractionated into both injectable and non-injectable products. The workshop covered a broad range of topics. A major objective of the workshop was to assist FDA in the development of plasma standards that would address concerns encountered over the years with regard to the preparation, storage, shipment, and use of plasma for both transfusion and the manufacture of plasma derived blood products such as Factor VIII and Immune Globulin Intravenous. Another objective was to gather information on current industry practices that are in place for the manufacture of plasma. At the end of the workshop, we invited written comments from workshop participants to gather additional public information on the subject of plasma freezing and storage.

We have established this docket to encourage interested parties to continue to provide information about suggested plasma standards, comments on the workshop, and comments on information submitted to the docket by other interested parties. We also request that those who have already submitted written comments and information to FDA resubmit the same comments to the docket to ensure their adequate consideration since this information was not previously submitted to the docket. This notice will also be posted at *http://www.fda.gov/cber/minutes/workshop-min.htm*.

Comments submitted to the docket will assist us in determining the need for and feasibility of establishing new standards for currently licensed plasma products, including time to freezing, freezing and storage temperatures, and shipping temperatures, among other issues. We may also consider this information in preparing any future additional standards for recovered plasma.

II. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments regarding the workshop. Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. A copy of this notice, the slide presentations and transcripts from the workshop, and received comments are available for public examination in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

III. Electronic Access

Persons with access to the Internet may obtain the slide presentations at *http://www.fda.gov/cber/summaries.htm* and the transcripts of the workshop at *http://www.fda.gov/cber/minutes/workshop-min.htm*.

Dated: December 15, 2004.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 04–28655 Filed 12–30–04; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2001D–0059 (formerly 01D–0059)]

Guidance for Industry on Submitting Separate Marketing Applications and Clinical Data for Purposes of Assessing User Fees; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a guidance for industry entitled ''Submitting Separate Marketing Applications and Clinical Data for Purposes of Assessing User Fees.'' The guidance describes the agency's current policy on what should be contained in separate marketing applications and what should be combined into one application for purposes of assessing user fees and a definition of ''clinical data'' for user fee purposes.

DATES: Submit written or electronic comments on agency guidances at any time.

ADDRESSES: Submit written requests for single copies of this guidance to the Division of Drug Information (HFD–240), Center for Drug Evaluation and Research, Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, or to the Office of Communication, Training, and Manufacturers Assistance (HFM–40), Center for Biologics Evaluation and Research, Food and Drug Administration, 1401 Rockville Pike, Rockville, MD 20852–1448. Send one self-addressed adhesive label to assist the office in processing your requests. Submit written comments on the guidance to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to *http://www.fda.gov/dockets/ecomments*. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

FOR FURTHER INFORMATION CONTACT:

Beverly Friedman, Center for Drug Evaluation and Research (HFD–7), Food and Drug Administration, 5600 Fishers Lane, or Rockville, MD 20857, 301–594–2041, FAX: 301–827–5562, or

Carla A. Vincent, Center for Biologics Evaluation and Research (HFM–110), 1401 Rockville Pike, Rockville, MD 20852, 301–827–

3503, FAX: 301–827–2875.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a guidance for industry entitled ''Submitting Separate Marketing Applications and Clinical Data for Purposes of Assessing User Fees.'' The guidance document describes FDA's thinking on what will be considered separate marketing applications and what will constitute clinical data for purposes of assessing user fees under sections 735 and 736 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 379g and 379h).

This guidance was issued in draft on February 22, 2001 (66 FR 11175) with comments due by March 26, 2001. No comments were received. In the meantime, Congress considered reauthorization of the user fee program. As a result, FDA delayed issuance of the guidance. Now that the program has been reauthorized without change to the relevant language, FDA is issuing the guidance. Other than minor editorial changes, only two changes of note have been made to the guidance. We have reevaluated our policy on pharmacy bulk packages and products for prescription compounding and determined that a separate application is no longer needed for these products unless otherwise noted in the guidance document. Therefore, the subsection entitled ''Pharmacy Bulk Packages and Products for Prescription Compounding'' has been removed. In addition, the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (Public Law 108–173) may require a new application to be submitted because of a change to the reference listed drug. Therefore, a new subsection was added to clarify the user fee liability.

The guidance represents the agency's current thinking on this topic. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statutes and regulations.

II. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments on the guidance at any time. Two copies of mailed comments are to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. The guidance and received comments are available for public examination in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

III. Electronic Access

Persons with access to the Internet may obtain the document at either *http://www.fda.gov/cder/guidance/index.htm* or *http://www.fda.gov/ohrms/dockets/default.htm*.

Dated: December 16, 2004.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 04–28654 Filed 12–30–04; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Submission for OMB review; comment request; California Health Interview Survey 2005

SUMMARY: Under the provisions of Section 3507(a)(1)(D) of the Paperwork Reduction Act of 1995, the National Cancer Institute, the National Institutes of Health has submitted to the Office of Management and Budget (OMB) a request to review and approve the information collection listed below. This proposed information collection was previously published in the **Federal Register** on August 5, 2004, p. 47450 and allowed 60 days for public comment. No public comments were received. The purpose of this notice is to allow an additional 30 days for public comment. The National Institutes of Health may not conduct or sponsor, and the respondent is not required to respond to, an information collection that has been extended, revised, or implemented on or after October 1, 1995, unless it displays a currently valid OMB control number.

Proposed Collection: Title: California Health Interview Survey 2005. *Type of Information Collection Request:* New. *Need and Use of Information Collection.* The NCI has sponsored two Cancer Control Modules to the California Health Interview Survey (CHIS), and will be sponsoring a third to be admitted in 2005. The CHIS is a telephone survey designed to provide population-based, standardized health-related data to assess California's progress in meeting Healthy People 2010 objectives for the nation and the state. The CHIS sample is designed to provide statistically reliable estimates statewide, for California counties, and for California's ethnically and racially diverse population. Initiated by the UCLA Center for Health Policy Research, the California Department of Health Services, and the California Public Health Institute, the survey is funded by a number of public and private sources. It was first administered in 2001 to 55,428 adults and subsequently in 2003 to 42,043 adults. These adults are a representative sample of California's non-institutionalized population living in households. CHIS 2005, the third bi-annual survey, is planned for administration to 55,000 adult Californians. The cancer control module, which is similar to that administered in CHIS 2001 and CHIS 2003, will allow NCI to examine trends in breast cancer screening and diagnosis, as well as to study other cancer-related topics, such as diet, physical activity and obesity.

Because California is the most populous and the most racially and ethnically diverse state in the nation, the CHIS 2005 sample will yield adequate numbers of respondents in key ethnic and racial groups, including African Americans, Latinos, Asians, and American Indian/Alaska Natives. The Latino group will include large numbers of Mexican-origin, Central Americans, South Americans, and other Latino subgroups; the Asian group will include large numbers of respondents in the Chinese, Filipino, Japanese, Vietnamese, and Korean subgroups. NCI will compare the CHIS and National Health Interview Survey (NHIS) data in order to conduct comparative analyses and better estimate cancer risk factors and screening among racial/ethnic minority populations. The CHIS sample size also permits NCI to create estimates for ethnic subdomains of the population, for which NHIS has insufficient numbers for analysis. *Frequency of Response:* One-time. *Affected Public:* Individuals. *Type of Respondents:* Adults (persons 18 years of age and older). The annual reporting burden is as follows:

TABLE A.—RESPONDENT AND HOUR BURDEN ESTIMATES FOR CHIS 2005 CANCER CONTROL TOPICAL MODULE

Type of respondents	Estimated number of respondents	Estimated number of responses per respondent	Average burden hours per response	Estimated total annual burden hours requested
Adult Individuals—Pilot CCM and Demographics	150	1	.17	25.50
Adult Individuals—CCM and Demographics	55,000	1	.17	9,350.00
Totals	.....	.....	.....	9,375.50

The annualized cost to respondents is estimated at: $140,632.50. There are no Capital Costs to report. There are no Operating or Maintenance Costs to report.

Request For Comments: Written comments and/or suggestions from the public and affected agencies should address one or more of the following points: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Direct Comments To OMB: Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the: Office of Management and Budget, Office of Regulatory Affairs, New Executive Office Building, Room 10235, Washington, DC 20503, Attention: Desk Officer for NIH. To request more information on the proposed project or to obtain a copy of the data collection plans and instruments, contact: Dr. Nancy Breen, Ph.D., Project Officer, National Cancer Institute, EPN 4005, 6130 Executive Boulevard MSC 7344. Bethesda, Maryland 20852–7344, or call non-toll free number (301) 496–8500 or e-mail your request, including your address to *breenn@mail.nih.gov.*

Comments Due Date: Comments regarding this information collection are best assured of having their full effect if received within 30-days of the date of this publication.

Dated: December 21, 2004.

Rachelle Ragland-Greene,

NCI Project Clearance Liaison, National Institutes of Health.

[FR Doc. 04–28687 Filed 12–30–04; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Government-Owned Inventions; Availability for Licensing

AGENCY: National Institutes of Health, Public Health Service, DHHS.

ACTION: Notice.

SUMMARY: The inventions listed below are owned by an agency of the U.S. Government and are available for licensing in the U.S. in accordance with 35 U.S.C. 207 to achieve expeditious commercialization of results of federally-funded research and development. Foreign patent applications are filed on selected inventions to extend market coverage for companies and may also be available for licensing.

ADDRESSES: Licensing information and copies of the U.S. patent applications listed below may be obtained by writing to the indicated licensing contact at the Office of Technology Transfer, National Institutes of Health, 6011 Executive Boulevard, Suite 325, Rockville, Maryland 20852–3804; telephone: (301) 496–7057; fax: (301) 402–0220. A signed Confidential Disclosure Agreement will be required to receive copies of the patent applications.

Use of Anti-Parafibromin Antibodies to Diagnose Hyperparathyroidism-Jaw Tumor Syndrome (HPT–JT) and Parathyroid Cancer

William Simonds, Jian-hua Zhang, and Geoffrey Woodard (NIDDK) U.S. Provisional Application No. 60/531,875 filed 22 Dec 2003 (DHHS Reference No. E–032–2004/0–US–01)

Licensing Contact: Brenda Hefti; (301) 435–4632; *heftib@mail.nih.gov.*

This technology relates to methods of diagnosing cancer using antibodies that specifically bind to parafibromin. Parafibromin appears to be a tumor suppressor. Mutations in the coding sequence, specifically truncations or deletions, might be indicative of cancer or increased susceptibility to cancer. Antibodies targeting this tumor suppressor protein might have utility as a cancer diagnostic or prognostic, either alone, or as part of a kit.

This technology is described, in part, in GE Woodard *et al.*, ''Parafibromin, product of the hyperparathyroidism-jaw tumor syndrome gene HRPT2, regulates cyclin D1/PRAD1 expression.'' Oncogene 2004 Dec 06 (e-pub ahead of print).

Eosinophil-Derived Neurotoxin, an Antimicrobial Protein with Ribonuclease Activity, is an Immunostimulant

De Yang *et al.* (NCI)

U.S. Patent Application No. 10/834,733 filed 29 Apr 2004 (DHHS Reference No. E–191–2003/1–US–01)

Licensing Contact: Brenda Hefti; (301) 435–4632; *heftib@mail.nih.gov.*

Eosinophil-derived neurotoxin (EDN) has in vitro anti-viral activity that is dependent on its ribonuclease activity. This invention discloses that EDN is a selective chemoattractant and activator of dendritic cells, resulting in dendritic cell migration, maturation, and a production of a wide variety of cytokines. Based on these potent chemotactic and activating effects on dendritic cells, EDN might be useful as a clinical immunoadjuvant for the promotion of immune responses to specific antigens of tumors or pathogenic organisms.

Genes Expressed in Prostate Cancer and Methods of Use

Ira Pastan, Tapan Bera, and Byungkook Lee (NCI)

U.S. Provisional Patent Application No. 60/461,399 filed 08 Apr 2003 (DHHS Reference No. E–148–2003/0–US–01)

PCT Application No. PCT/US04/10588 filed 05 Apr 2004, which published as WO 2004/092213 on 28 Oct 2004

(DHHS Reference No. E–148–2003/0–PCT–02)

Licensing Contact: Brenda Hefti; (301) 435–4632; *heftib@mail.nih.gov.*

This invention is a novel gene, called New Gene Expressed in Prostate (NGEP). This gene appears to be expressed only in prostate. This gene has two known splice variants of significantly different size. The shorter splice variant encodes a cytoplasmic protein, while the longer splice variant encodes a plasma membrane protein.

This patent application contains claims to the polypeptide, NGEP, nucleotides encoding NGEP, antibodies that bind NGEP polypeptides, and methods of using these polypeptides, polynucleotides, and antibodies.

The presence of the protein on the cell surface and the selective expression in prostate and prostate cancer make this a potential target for prostate cancer diagnostics and therapeutics. Potential therapeutics could be gene-based, vaccines, antibodies, or immunoconjugates. Further information can be obtained by viewing a recent publication by the inventors (PNAS v. 104 no. 9, p. 3050–3064, March 2, 2004).

Immunogenic Peptides for the Treatment of Prostate and Breast Cancer

Jay Berzofsky, Sang-kon Oh, and Ira Pastan (NCI)

U.S. Provisional Patent Application 60/476,467 filed 05 Jun 2003 (DHHS Reference No. E–116–2003/0–US–01)

PCT Application No. PCT/US04/17574 filed 02 Jun 2004 (DHHS Reference No. E–116–2003/0–PCT–02)

Licensing Contact: Brenda Hefti; (301) 435–4632; *heftib@mail.nih.gov.*

This invention relates to antigenic sequences of the T cell receptor gamma alternate reading frame protein (TARP). TARP is expressed in breast cancer cells and prostate cancer cells. The patent application discloses immunogenic TARP polypeptides that generate an immune response to breast or prostate cancer cells that express TARP. These include sequences modified to make them more immunogenic. The application also discloses specific TARP nucleic acid sequences and host cells transfected with these nucleic acids. This invention may be useful as a therapeutic to treat breast or prostate cancer.

Detection of Antigen-Specific T Cells and Novel T Cell Epitopes by Acquisition of Peptide/HLA–GFP Complexes

Steven Jacobson, Utano Tomaru, and Yoshihisa Yamano (NINDS)

PCT Application No. PCT/US04/08960 filed 24 Mar 2004, which published as WO 2004/084838 on 07 Oct 2004 (DHHS Reference No. E–084–2003/2–PCT–01)

Licensing Contact: Brenda Hefti; (301) 435–4632; *heftib@mail.nih.gov.*

This invention relates to a method for identifying specific T cell epitopes and antigen-specific T cells through labeling with an HLA-GFP complex expressed on an antigen-presenting cell. The T cells acquired the peptide-HLA-GFP complex through T cell mediated endocytosis upon specific antigen stimulation. This basic method can be used for several purposes. First, it can be used to generate a T-cell immune response through the attachment of a reporter peptide to the antigen-presenting cell. It can also be used as a way to assay a population of cells to determine whether any T cells specific for a particular antigen are present. This might be useful in applications related to autoimmunity, infectious disease, or cancer. Third, it can be used as a therapeutic to eliminate antigen-specific T cells associated with disease, if coupled to a toxic moiety.

Use of Cripto-1 as a Biomarker for Neurodegenerative Disease and Method of Inhibiting Progression Thereof

David S. Salomon (NCI), Berman Nancy (EM), Edward B. Stephens (EM)

U.S. Provisional Application No. 60/508,750 filed 03 Oct 2003 (DHHS Reference No. E–075–2003/0–US–01)

PCT Application No. PCT/US04/32649 filed 01 Oct 2004 (DHHS Reference No. E–075–2003/0–PCT–02)

Licensing Contact: Brenda Hefti; (301) 435–4632; *heftib@mail.nih.gov.*

Cripto-1 is a gene that is currently thought to play an important role in several cancers, and is being developed in clinical trials as a cancer therapeutic.

The current invention relates to another use of Cripto-1 as a biomarker and possible therapeutic target for a variety of neurodegenerative diseases, including NeuroAids, Alzheimer's disease, MS, ALS, Parkinson's disease and encephalitis. Cripto-1 appears to be overexpressed by 20-fold or more in NeuroAids and as such may be enhanced in other inflammatory neurological diseases, and thus assist in the early detection of neurological changes associated with these diseases, as well as a possible therapeutic target for slowing progression.

Protein Kinase C Inhibitor, Related Composition, and Method of Use

Shaomeng Wang, Peter Blumberg (NCI), Nancy Lewin (NCI)

U.S. Provisional Patent Application No. 60/451,214 filed 28 Feb 2003 (DHHS Reference No. E–073–2003/0–US–01)

PCT Application No. PCT/US04/05855 filed 26 Feb 2004, which published as WO 2004/078118 on 16 Sep 2004 (DHHS Reference No. E–073–2003/0–PCT–02)

*Licensing Contact:*Brenda Hefti; (301) 435–4632; *heftib@mail.nih.gov.*

Protein kinase C is a critical component in cellular signaling, involved in cellular growth, differentiation, and apoptosis. It has been identified as a promising therapeutic target for cancer, diabetic retinopathy, and Alzheimer's disease, among other indications. This invention relates to lead compounds that can inhibit protein kinase C isoforms through disruption of their C1 domains. The inventors also found that these compounds possess isoform selectivity, an important feature for therapeutic specificity. Finally, although the disclosed compounds are previously known molecules, novel structures are described in the invention that have further improved specificity.

Recombinant Immunotoxin and Use in Treating Tumors

Ira Pastan (NCI), Masanori Onda (NCI), Nai-Kong Cheung (EM)

PCT Application No. PCT/US03/38227 filed 01 Dec 2003, which published as WO 2004/050849 on 17 Jun 2004 (DHHS Reference No. E–051–2003/0–PCT–02)

Licensing Contact: Brenda Hefti; (301) 435–4632; *heftib@mail.nih.gov.*

The current invention relates to the 8H9 monoclonal antibody (MAb), which is highly reactive with a cell surface glycoprotein expressed on human breast cancers, childhood sarcomas, and neuroblastomas but is not reactive with the cell surface of normal human tissues. This specific reactivity suggests that this antibody could be useful as a diagnostic, or as a therapeutic molecule to treat breast cancer, osteosarcoma, and neuroblastoma. The PCT application claims the 8H9 protein, 8H9 antibodies, 8H9 immunotoxins, pharmaceutical compositions, and methods of use.

More information can be found in a recent publication: M. Onda *et al.*, ''In vitro and in vivo cytotoxic activities of recombinant immunotoxin 8H9(Fv)-PE38 against breast cancer, osteosarcoma, and neuroblastoma,'' Cancer Res. 2004 Feb 15;64(4):1419–1424.

Activation of Recombinant Diphtheria Toxin Fusion Proteins by Specific Proteases Highly Expressed on the Surface of Tumor Cells

Stephen Leppla, Shi-Hui Liu, Manuel Osorio, and Jennifer Avallone (NIDCR)
U.S. Provisional Application No. 60/468,577 filed 06 May 2003 (DHHS Reference No. E–331–2002/0–US–01)
PCT Application No. PCT/US04/01430 filed 06 May 2004 (DHHS Reference No. E–331–2002/0–PCT–02)
Licensing Contact: Brenda Hefti; (301) 435–4632; *heftib@mail.nih.gov.*

This invention relates to diphtheria toxin fusion proteins comprising a diphtheria toxin (DT) cell-killing component and a cell-binding component such as granulocyte macrophage colony-stimulating factor (GM–CSF), interleukin 2 (IL–2), or epidermal growth factor (EGF). Receptors for the latter three materials are present on many types of cancer cells; therefore, these fusion proteins bind preferentially to these cancer cells. A key feature is that these toxins are altered so as to require activation by a cell-surface protease that is overexpressed on many types of cancers. Examples of such proteases include matrix metalloproteinases and urokinase plasminogen activator. Consequently, these novel cytotoxins kill tumors expressing receptors for either GM–CSF, IL–2, or EGF along with the cell-surface protease. Because killing requires the presence of both a receptor and a cancer-cell enriched protease, and few normal tissues contain both, there is less toxicity to normal cells. Thus, a larger amount of the agent may be used for cancer therapy without inducing side effects. In other words, these cytotoxins have a higher therapeutic index than toxins that are targeted to cells using a single strategy.

BASE, a New Cancer Gene, and Uses Thereof

Ira Pastan, Kristi Egland, James Vincent, Byungkook Lee, and Robert Strausberg (NCI)
PCT Application No. PCT/US03/39476 filed 10 Dec 2003 (DHHS Reference No. E–321–2002/0–PCT–02)
Licensing Contact: Brenda Hefti; (301) 435–4632; *heftib@mail.nih.gov*

The present invention identifies a new gene expressed in breast cancers. The gene undergoes alternative splicing, and is expressed as one of two polypeptides. Both splice variants appear to be secreted proteins, and therefore good potential therapeutic targets. The patent application claims BASE polypeptides, nucleic acids, gene therapy and vaccine uses, and antibodies. This novel gene target might be useful as a breast cancer marker for diagnostics, or as a target for breast cancer therapeutics.

Applications for the HMGN1 Pathway

Michael Bustin (NCI)
U.S. Provisional Patent Application No. 60/455,728 filed 17 Mar 2003 (DHHS Reference No. E–208–2002/0–US–01)
PCT Application No. PCT/US04/08060 filed 17 Mar 2004, which published as WO 2004/083398 on 30 Sep 2004 (DHHS Reference No. E–208–2002/0–PCT–02)
Licensing Contact: Brenda Hefti; (301) 435–4632; *heftib@mail.nih.gov*

HMGN1 is a protein that binds to nucleosomes, changes chromatin structure and affects transcription, and the expression of this protein changes during differentiation. Mice lacking this protein have increased growth capacity of several skin components, including epidermis, epidermal appendages, and dermis. Conceivably, this change could be related to an alteration of stem cell differentiation or to cell cycling events. The current invention relates to interference with this pathway, which might lead to increased stem cell differentiation and increased hair cycling and growth in humans as well. This invention might be useful to increase hair growth, enhance wound healing for epidermal and dermal wounds, and enhance stem cell populations for tissue regeneration, gene targeting, or gene therapeutic indications.

Dated: December 20, 2004.

Steven M. Ferguson,

Director, Division of Technology Development and Transfer, Office of Technology Transfer, National Institutes of Health.

[FR Doc. 04–28684 Filed 12–30–04; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Prospective Grant of an Exclusive License: ''Vasostatin as Marrow Protectant'' and ''Use of Calreticulin and Calreticulin Fragments To Inhibit Endothelial Cell Growth and Angiogenesis and Suppress Tumor Growth''

AGENCY: National Institutes of Health, Public Health Service, DHHS.

ACTION: Notice.

SUMMARY: This notice, in accordance with 35 U.S.C. 209(c)(1) and 37 CFR part 404.7(a)(1)(i), announces that the Department of Health and Human Services is contemplating the grant of an exclusive license to practice the inventions embodied in U.S. Patent No. 6,596,690 B2 entitled ''Vasostatin as Marrow Protectant'' (DHHS Reference E–230–2000/0); U.S. Patent Application No. 09/807,148 filed April 5, 2001, entitled ''Use of Calreticulin and Calreticulin fragments to inhibit endothelial cell growth and angiogenesis and suppress tumor growth'' (DHHS Reference E–082–1998/0–US–03); PCT Application No. PCT/US99/23240 filed October 5, 1999 entitled ''Use of Calreticulin and Calreticulin fragments to inhibit endothelial cell growth and angiogenesis and suppress tumor growth'' (DHHS Reference E–082–1998/0–PCT–02); to BioAccelerate, Inc., a venture capital group controlling the following twelve companies: Bioenvision, Enhance Biotech, Evolve Oncology, CNS Thera, Innova Lifestyle, Inncardio, Anvira, Neuro Bioscience, Biocardio, Oncbio, Innovative Oncology and Genar Oncology. The patent rights in these inventions have been assigned to the United States of America.

The prospective exclusive license territory may be worldwide and the field of use may be limited to development and sale of a pharmaceutical product useful in protecting bone marrow stem cells from the toxic effects of chemotherapy and radiotherapy.

DATES: Only written comments and/or license applications which are received by the National Institutes of Health on or before March 4, 2005 will be considered.

ADDRESSES: Requests for copies of the patent and/or patent applications, inquiries, comments and other materials relating to the contemplated exclusive license should be directed to: Mojdeh Bahar, J.D., Technology Licensing Specialist, Office of Technology Transfer, National Institutes of Health, 6011 Executive Boulevard, Suite 325, Rockville, MD 20852–3804. Telephone: (301) 435–2950; Facsimile: (301) 402–0220; E-mail: *baharm@od.nih.gov*.

SUPPLEMENTARY INFORMATION: The technology claimed in the aforementioned patents is based on the discovery of the calreticulin N-domain (vasostatin) and the three previously uncharacterized properties of calreticulin. First, calreticulin N-domain is shown to stimulate the proliferation and survival in vitro of hematopoietic cells in the presence of previously identified growth factors. Second, Vasostatin is shown to protect

hematopoietic cells in vitro from toxicity induced by a variety of chemotherapeutic agents. Third, Vasostatin is shown to protect a subject from toxicity to the hematopoietic system induced by chemotherapy or irradiation.

The prospective exclusive license will be royalty-bearing and will comply with the terms and conditions of 35 U.S.C. 209 and 37 CFR part 404.7. The prospective exclusive license may be granted unless within sixty (60) days from the date of this published notice, the NIH receives written evidence and argument that establish that the grant of the license would not be consistent with the requirements of 35 U.S.C. 209 and 37 CFR part 404.7.

Applications for a license in the field of use filed in response to this notice will be treated as objections to the grant of the contemplated exclusive license. Comments and objections submitted to this notice will not be made available for public inspection and, to the extent permitted by law, will not be released under the Freedom of Information Act, 5 U.S.C. 552.

Dated: December 20, 2004.

Steven M. Ferguson,

Director, Division of Technology Development and Transfer, Office of Technology Transfer, National Institutes of Health.

[FR Doc. 04–28686 Filed 12–30–04; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Government-Owned Inventions; Availability for Licensing

AGENCY: National Institutes of Health, Public Health Service, DHHS.

ACTION: Notice.

SUMMARY: The inventions listed below are owned by an agency of the U.S. Government and are available for licensing in the U.S. in accordance with 35 U.S.C. 207 to achieve expeditious commercialization of results of federally-funded research and development. Foreign patent applications are filed on selected inventions to extend market coverage for companies and may also be available for licensing.

ADDRESSES: Licensing information and copies of the U.S. patent applications listed below may be obtained by writing to the indicated licensing contact at the Office of Technology Transfer, National Institutes of Health, 6011 Executive Boulevard, Suite 325, Rockville, Maryland 20852–3804; telephone: (301) 496–7057; fax: (301) 402–0220. A signed Confidential Disclosure Agreement will be required to receive copies of the patent applications.

Novel Compounds and Methods for Treating Alzheimer's and Related Diseases

Nigel H. Greig *et al.* (NIA)
U.S. Provisional Application filed 22 Oct 2004 (DHHS Reference No. E–172–2004/0–US–01)
Licensing Contact: Norbert Pontzer; (301) 435–5502; *pontzern@mail.nih.gov.*

The brain cholinergic system is thought to play an important role in learning and memory. The loss of cholinergic neurons early in the course of Alzheimer's Disease may thus be an etiological factor in the cognitive decline that is the hallmark of that disease. Therefore, potentiating cholinergic transmission has been the main pharmacological approach for the treatment of AD patients. Inhibition of acetylcholinesterase (AChE) or butyrylcholinesterase (BChE) enhances cholinergic transmission by reducing enzymatic degradation of acetylcholine.

AChE inhibitors are now used clinically to help restore cognitive function in AD patients. However the therapeutic index for inhibition of AChE is quite low. Drugs with this mechanism of action have to have the proper pharmacodynamic properties to achieve even a marginally useful clinical effect without unacceptable side effects. The presence of BChE in brain tissue makes this enzyme another possible target for increasing the activity of the cholinergic system.

The present invention provides a series of novel and potent tricyclic compounds that have a range of selectivity for inhibiting AchE, as compared to BchE, and possess neuroprotective activity in cell culture models. Also provided are methods of using these compounds to treat a number of different medical conditions such as Alzheimer's Disease, mild cognitive impairment, and other dementia-related disorders.

In addition to licensing, the technology is available for further development through collaborative research with the inventors via a Cooperative Research and Development Agreement (CRADA).

Novel Methods for Reducing Inflammation and Treating Diseases such as Parkinson's and Alzheimer's Disease

Jau-Shyong Hong *et al.* (NIEHS)
U.S. Provisional Application No. 60/570,566 filed 12 May 2004 (DHHS Reference No. E–130–2004/0–US–01)
Licensing Contact: Norbert Pontzer; (301) 435–5502; *pontzern@mail.nih.gov.*

Activated microglia mediate inflammation in the CNS by secreting various cytokines and free radicals that could damage neurons. Brains from patients with Parkinson disease show microglia reaction, and previous studies by this laboratory show microglia activation leads to inflammation mediated dopaminergic degeneration. Thus identification of drugs that reduce microglia activation could prevent or reverse neuronal degeneration in Parkinson's Disease, Alzheimer's Disease, ischemia and other degenerative CNS disorders.

Considerable research has shown the ability of various peptides to attenuate microglia activation and prevent neuronal degeneration *in vitro* with a bi-modal dose response curve. These peptides demonstrate maximum effects at femto-molar and micro-molar concentrations. These inventors have now discovered small-peptide and non-peptide molecules that also inhibit microglia and prevent neuronal degeneration with the same bi-modal dose response curve. The non-peptide compounds have also been shown to prevent dopamine neuronal degeneration in animal models. The present invention provides compositions and methods for inhibiting inflammatory mechanisms and treating inflammation-related condition by administering ultra-low (femto-molar) doses of at least one compound of the invention. These compounds include morphinans, opioid peptides, and the tripeptide GGF.

In addition to licensing, the technology is available for further development through collaborative research with the inventors via a Cooperative Research and Development Agreement (CRADA).

Multi-Domain Amphipathic Helical Peptides and Methods of Their Use

Alan Remaley *et al.* (NHLBI)
U.S. Provisional Application filed 15 Oct 2004 (DHHS Reference No. E–114–2004/0–US–01)
Licensing Contact: Fatima Sayyid; (301) 435–4521; *sayyidf@mail.nih.gov.*

Mutations in the ABCA1 transporter lead to diseases characterized by the accumulation of excess cellular cholesterol, low levels of HDL and an increased risk for cardiovascular disease. Currently, there are a wide variety of treatments for dyslipidemia, which include, but are not limited to,

pharmacologic regimens (mostly statins), partial ileal bypass surgery, portacaval shunt, liver transplantation, and removal of atherogenic lipoproteins by one of several apheresis procedures.

The present invention relates to the composition of peptides or peptide analogs with multiple amphipathic α-helical domains that promote lipid efflux from cells. It further relates to methods for identifying non-cytotoxic peptides that promote lipid efflux from cells that are useful in the treatment and prevention of dyslipidemic and vascular disorders. Dyslipidemic and vascular disorders amenable to treatment with the isolated multi-domain peptides include, but are not limited to, hyperlipidemia, hyperlipoproteinemia, hypercholesterolemia, hypertriglyceridemia, HDL deficiency, apoA-I deficiency, coronary artery disease, atherosclerosis, thrombotic stroke, peripheral vascular disease, restenosis, acute coronary syndrome, and reperfusion myocardial injury.

Dated: December 22, 2004.

Steven M. Ferguson,

Director, Division of Technology Development and Transfer, Office of Technology Transfer, National Institutes of Health.

[FR Doc. 04–28688 Filed 12–30–04; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Cancer Institute Special Emphasis Panel; Stem Cell Transplantation Quality Control.

Date: January 26, 2005.

Time: 11:30 a.m. to 2:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6130 Executive Blvd., Rockville, MD 20852. (Telephone conference call).

Contact Person: Sherwood Githens, PhD, Scientific Review Administrator, Special Review and Logistics Branch, National Cancer Institute, Division of Extramural Activities, 6116 Executive Blvd., Bethesda, MD 20892. 301/435–1822. *githenss@mail.nih.gov.*

The notice is being published less than 15 days prior to the meeting due to the urgent need to meet timing limitations imposed by the intramural research review cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS.)

Dated: December 23, 2004.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 04–28681 Filed 12–30–04; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Human Genome Research Institute; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of a meeting of the National Advisory Council for Human Genome Research.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and/or contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications and/or contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Advisory Council for Human Genome Research.

Date: February 7–8, 2005.

Open: February 7, 2005, 8:30 a.m. to 12 p.m.

Agenda: To discuss matters of program relevance.

Place: National Institutes of Health, 5635 Fishers Lane, Rockville, MD 20852.

Closed: February 7, 2005, 1 p.m. to adjournment on Tuesday, February 8, 2005.

Agenda: To review and evaluate grant applications and/or proposals.

Place: National Institutes of Health, 5635 Fishers Lane, Rockville, MD 20852.

Contact Person: Mark S. Guyer, Director for Extramural Research, National Human Genome Research Institute, 5635 Fishers Lane, Suite 4076, MSC 9305, Bethesda, MD 20892. 301–496–7531. *guyerm@mail.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

Information is also available on the Institute's/Center's home page: *http://www.genome.gov/11509849*, where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program No. 93.172, Human Genome Research, National Institutes of Health, HHS)

Dated: December 23, 2004.

Laverne Y. Stringfield

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 04–28682 Filed 12–30–04; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Mental Health; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Mental Health Special Emphasis Panel; SBIR Topic 55.

Date: January 25, 2005.
Time: 9 a.m. to 5 p.m.
Agenda: To review and evaluate contract proposals.
Place: Bethesda North Marriott Hotel & Conference Center, Montgomery County Conference Center Facility, 5701 Marinelli Road, North Bethesda, MD 20852.
Contact Person: Michael J. Moody, Scientific Review Administrator, Division of Extramural Activities, National Institute of Mental Health, NIH, Neuroscience Center, 6001 Executive Blvd., Room 6156, MSC 9608, Bethesda, MD 20892–9608. 301–443–5160. *mmoody@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.242, Mental Health Research Grants; 93.281, Scientist Development Award, Scientist Development Award for Clinicians, and Research Scientist Award; 93.282, Mental Health National Research Service Awards for Research Training, National Institutes of Health, HHS.)

Dated: December 23, 2004.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 04–28680 Filed 12–30–04; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Deafness and Other Communications Disorders; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Deafness and Other Communications Disorders Special Emphasis Panel, P30 Research Core Center Review Panel.
Date: January 26, 2005.
Time: 1 p.m. to 4 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, 6120 Executive Blvd., Rockville, MD 20852, (Telephone Conference Call).
Contact Person: Da-yu Wu, PhD., Scientific Review Administrator, Scientific Review Branch, Division of Extramural Activities, NIDCD, NIH, 6120 Executive Blvd., Suite 400C, Bethesda, MD 20892, 301–496–8683, *wudy@nidcd.nih.gov.*
Name of Committee: Communication Disorders Review Committee, Communications Disorders Review Committee.
Date: February 16–17, 2005.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.
Contact Person: Melissa J. Stick, PhD., MPH, Chief, Scientific Review Branch, Division of Extramural Research, NIDCD/NIH, 6120 Executive Blvd., Bethesda, MD 20892, 301–496–8683.
Name of Committee: National Institute on Deafness and Other Communications Disorders Special Emphasis Panel. Temporal Bone Consortium Meeting.
Date: March 1, 2005.
Time: 8 a.m. to 4 p.m.
Agenda: To review and evaluate grant applications.
Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.
Contact Person: Sheo Singh, PhD., Scientific Review Administrator, Scientific Review Branch, Division of Extramural Activities, Executive Plaza South, Room 400C, 6120 Executive Blvd., Bethesda, MD 20892, 301–496–8683.

(Catalogue of Federal Domestic Assistance Program No. 93.173, Biological Research Related to Deafness and Communicative Disorders, National Institutes of Health, HHS)

Dated: December 23, 2004.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 04–28683 Filed 12–30–04; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institute of Health

National Institute of Child Health and Human Development (NICHD) in Collaboration With the Center for Medicare and Medicaid Services (CMS) Workshop To Develop a Research Agenda on Appropriate Settings for Rehabilitation; Notice of Meeting

Pursuant to a directive by CMS, notice is hereby given of a meeting of the Workshop To Develop a Research Agenda on Appropriate Settings for Rehabilitation in February 2005.

CMS issued a final rule on patients eligible for admission to inpatient rehabilitation. CMS committed to convene an expert panel to establish a research agenda towards obtaining data on patients in other diagnostic categories who might benefit from rehabilitation. The primary purpose of the meeting is to identify a research agenda for future follow-up.

Attendance by the public will be limited to space available. Please communicate with the individual listed as contact below to request special accommodations for persons with disabilities.

Additional information may be obtained either by accessing the CMS Web site, *www.cms.gov,* or by communicating with the contact whose name and telephone number is listed below.

Meeting Dates/Times: February 14, 2005, 8:30 a.m. to 5 p.m.; February 15, 2005, 8:30 a.m. to 5 p.m.

Address: NIH Campus, Building 31, Room 2A47 (second floor), 9000 Rockville Pike, Bethesda, Maryland 20892.

Contact: Michael Weinrich, M.D., Director, National Center for Medical Rehabilitation Research, National Institute of Child Health and Human Development, National Institutes of Health, 6100 Executive Boulevard, Room 2A03, MSC 7510, Rockville, MD 20892, Telephone: (301) 402–4201; Fax: (301) 402–0832, E-mail: *weinricm@mail.nih.gov.*

Dated: December 27, 2004.

Michael Weinrich,

Director, National Center for Medical Rehabilitation, Research, National Institute of Child Health and Human Development, National Institutes of Health.

[FR Doc. 04–28685 Filed 12–30–04; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute clearly unwarranted invasion of personal privacy.

Name of Commitee: Center for Scientific Review Special Emphasis Panel Pharmacogenetics and Bioinformatics.

Date: January 3, 2005.

Time: 1 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Barbara Whitmarsh, PHD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2206, MSC 7890, Bethesda, MD 20892, (301) 435–4511, *whitmarshb@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Commitee: Oncological Sciences Integrated Review Group, Radiation Therapeutics and Biology Study Section.

Date: January 28–29, 2005.

Time: 8:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Holiday Inn Ventura Beach Resort, 450 East Harbor, Ventura, CA 93001.

Contact Person: Bo Hong, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6194, MSC 7890, Bethesda, MD 20892, (301) 435–5879, *hongb@csr.nih.gov.*

Name of Commitee: Oncological Sciences Integrated Review Group, Cancer Molecular Pathobiology Study Section.

Date: January 30–February 1, 2005.

Time: 6 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Washington Embassy Row, 2015 Massachusetts Ave., NW., Washington, DC 20036.

Contact Person: Elaine Sierra-Rivera, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6184, MSC 7804, Bethesda, MD 20892, (301) 435–1779, *riverase@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research; 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: December 27, 2004.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 04–28714 Filed 12–30–04; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4513–N–19]

Credit Watch Termination Initiative

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Notice.

SUMMARY: This notice advises of the cause and effect of termination of Origination Approval Agreements taken by HUD's Federal Housing Administration (FHA) against HUD-approved mortgagees through the FHA Credit Watch Termination Initiative. This notice includes a list of mortgagees which have had their Origination Approval Agreements terminated.

FOR FURTHER INFORMATION CONTACT: The Quality Assurance Division, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Room B133–P3214, Washington, DC 20410–8000; telephone (202) 708–2830 (this is not a toll free number). Persons with hearing or speech impairments may access that number through TTY by calling the Federal Information Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION: HUD has the authority to address deficiencies in the performance of lenders' loans as provided in HUD's mortgagee approval regulations at 24 CFR 202.3. On May 17, 1999 (64 FR 26769), HUD published a notice on its procedures for terminating Origination Approval Agreements with FHA lenders and placement of FHA lenders on Credit Watch status (an evaluation period). In the May 17, 1999 notice, HUD advised that it would publish in the **Federal Register** a list of mortgagees, which have had their Origination Approval Agreements terminated.

Termination of Origination Approval Agreement: Approval of a mortgagee by HUD/FHA to participate in FHA mortgage insurance programs includes an Origination Approval Agreement (Agreement) between HUD and the mortgagee. Under the Agreement, the mortgagee is authorized to originate single family mortgage loans and submit them to FHA for insurance endorsement. The Agreement may be terminated on the basis of poor performance of FHA-insured mortgage loans originated by the mortgagee. The termination of a mortgagee's Agreement is separate and apart from any action taken by HUD's Mortgagee Review Board under HUD's regulations at 24 CFR part 25.

Cause: HUD's regulations permit HUD to terminate the Agreement with any mortgagee having a default and claim rate for loans endorsed within the preceding 24 months that exceeds 200 percent of the default and claim rate within the geographic area served by a HUD field office, and also exceeds the national default and claim rate. For the 21st review period, HUD is terminating the Agreement of mortgagees whose default and claim rate exceeds both the national rate and 200 percent of the field office rate.

Effect: Termination of the Agreement precludes that branch(s) of the mortgagee from originating FHA-insured single family mortgages within the area of the HUD field office(s) listed in this notice. Mortgagees authorized to purchase, hold, or service FHA insured mortgages may continue to do so.

Loans that closed or were approved before the termination became effective may be submitted for insurance endorsement. Approved loans are (1) those already underwritten and approved by a Direct Endorsement (DE) underwriter employed by an unconditionally approved DE lender and (2) cases covered by a firm commitment issued by HUD. Cases at earlier stages of processing cannot be submitted for insurance by the terminated branch; however, they may be transferred for completion of processing and underwriting to another mortgagee or branch authorized to originate FHA insured mortgages in that area. Mortgagees are obligated to continue to pay existing insurance premiums and meet all other obligations associated with insured mortgages.

A terminated mortgagee may apply for a new Origination Approval Agreement if the mortgagee continues to be an approved mortgagee meeting the requirements of 24 CFR 202.5, 202.6, 202.7, 202.8 or 202.10 and 202.12, if there has been no Origination Approval Agreement for at least six months, and if the Secretary determines that the underlying causes for termination have been remedied. To enable the Secretary to ascertain whether the underlying causes for termination have been remedied, a mortgagee applying for a new Origination Approval Agreement must obtain an independent review of the terminated office's operations as well as its mortgage production, specifically including the FHA-insured mortgages cited in its termination notice. This independent analysis shall identify the underlying cause for the mortgagee's high default and claim rate. The review must be conducted and issued by an independent Certified Public Accountant (CPA) qualified to perform audits under Government Auditing Standards as provided by the General Accounting Office. The mortgagee must also submit a written corrective action plan to address each of the issues identified in the CPA's report, along with evidence that the plan has been implemented. The application for a new Agreement should be in the form of a letter, accompanied by the CPA's

report and corrective action plan. The request should be sent to the Director, Office of Lender Activities and Program Compliance, 451 Seventh Street, SW., Room B133–P3214, Washington, DC 20410–8000 or by courier to 490 L'Enfant Plaza, East, SW., Suite 3214, Washington, DC 20024.

Action: The following mortgagees have had their Agreements terminated by HUD:

Mortgagee name	Mortgagee branch address	HUD office jurisdictions	Termination effective date	Home ownership centers
American Southwest Mortgage Funding Inc.	1240 Pennsylvania NE Ste E, Albuquerque, NM 87110.	Albuquerque, NM	11/17/2004	Denver.
Atlantic Coast Mortgage Services	1009 S Main Street, Pleasantville, NJ 08232.	Camden, NJ	11/17/2004	Philadelphia.
Axis Mortgage & Investments LLC	1201 S Alma School Rd # 3700, Mesa, AZ 85210.	Phoenix, AZ	11/17/2004	Santa Ana.
Custom Mortgage, Inc	1712 N Meridian St Ste 200, Indianapolis, IN 46202.	Indianapolis, IN	11/17/2004	Atlanta.
Great Oak Mortgage Company	2350 Airport Freeway Ste 505, Bedford, TX 76022.	Dallas, TX	11/17/2004	Denver.
Harry Mortgage Company	3048 N. Grand Blvd., Oklahoma City, OK 73107.	Oklahoma City, OK	11/17/2004	Denver.
Homestead Financial Services Inc	5795 Widewaters Pkwy, Syracuse, NY 13214.	Buffalo, NY	11/17/2004	Philadelphia.
Quality Financial Services LC	2880 South Main Street Ste 117, Salt Lake City, UT 84115.	Salt Lake City, UT	10/24/2004	Denver.
SD Mortgage Services LTD	6836 Austin Center Blvd #100, Austin, TX 78731.	San Antonio, TX	10/24/2004	Denver.
Texas American Mortgage Inc	19 Briar Hollow Lane #230, Houston, TX 77027.	Houston, TX	11/17/2004	Denver.

Dated: December 23, 2004.

Sean Cassidy,

General Deputy Assistant Secretary for Housing.

[FR Doc. 04–28690 Filed 12–30–04; 8:45 am]

BILLING CODE 4210–27–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Information Collection Renewal To Be Submitted to the Office of Management and Budget (OMB) for Approval Under the Paperwork Reduction Act; Monitoring Recovered Species After Delisting as Required Under Section 4(g) of the Endangered Species Act—American Peregrine Falcon; 1018–0101

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice; request for comments.

SUMMARY: The Fish and Wildlife Service (We) plan to submit to OMB a request to renew the collection of information described below. The Endangered Species Act requires that all species that are recovered and removed from the List of Endangered and Threatened Wildlife (delisted) be monitored. We will use the information that we collect under OMB Control No. 1018–0101 to determine if the American peregrine falcon remains recovered.

DATES: You must submit comments on or before March 4, 2005.

ADDRESSES: Send your comments on the information collection requirement via mail to Hope Grey, Information Collection Clearance Officer, Fish and Wildlife Service, 4401 North Fairfax Drive, Mail Stop 222–ARLSQ, Arlington, Virginia 22203; *hope_grey@fws.gov* (e-mail); or (703) 358–2269 (fax).

FOR FURTHER INFORMATION CONTACT: To request a copy of the proposed information collection requirement, related forms, or explanatory material, contact Hope Grey, Information Collection Clearance Officer, at the above addresses or by telephone at (703) 358–2482.

SUPPLEMENTARY INFORMATION: OMB regulations at 5 CFR part 1320, which implement provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), require that interested members of the public and affected agencies have an opportunity to comment on information collection and recordkeeping activities (*see* 5 CFR 1320.8(d)). We plan to submit a request to OMB to renew its approval of the collection of information included in the Monitoring Plan for the American Peregrine Falcon, a Species Recovered Under the Endangered Species Act (Monitoring Plan) (USFWS 2003). The Monitoring Plan is available on our Web site at *http://endangered.fws.gov/recovery/peregrine/plan2003.pdf.* The existing OMB approval for information collection under the Monitoring Plan expires on March 31, 2005. We are requesting a 3-year term of approval for this information collection. Federal agencies may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control number for this collection of information is 1018–0101.

The American peregrine falcon was removed from the List of Endangered and Threatened Wildlife on August 25, 1999. Section 4(g) of the Endangered Species Act (ESA) requires that all species that are recovered and removed from the List of Endangered and Threatened Wildlife (delisted) be monitored in cooperation with the States for a period of not less than 5 years. The purpose of this requirement is to detect any failure of a recovered species to sustain itself without the protections of the ESA. We work with relevant State agencies and other species experts to develop appropriate plans and procedures for systematically monitoring recovered wildlife and plants. The information supplied on the forms will be used to review the status of the American peregrine falcon in the United States and allow us to determine if it remains recovered and, therefore, does not require the protections of the ESA. The obligation to provide the information is voluntary.

The American peregrine falcon has a large geographic distribution that includes a substantial amount of non-Federal land. Although the ESA requires that monitoring of recovered species be conducted for not less than 5 years, the life history of American peregrine falcons is such that it is appropriate to

monitor this species for a longer period of time in order to meaningfully evaluate whether the recovered species continues to maintain its recovered status. We solicited public comments on the draft Monitoring Plan twice in 2001, and the final Monitoring Plan was released in 2003. Rangewide population monitoring of American peregrine falcons under the Monitoring Plan will take place every 3 years through 2015. Formal collection of monitoring data commenced in 2003. Monitoring data will be collected again in 2006, 2009, 2012, and 2015. Therefore, by 2015, the U.S. Fish and Wildlife Service will have 5 years of population monitoring data.

The information collection requirement in this submission implements the requirements of the Endangered Species Act (16 U.S.C. 1539). There are no corresponding Service regulations for the ESA's post-delisting monitoring requirement. This information collection also implements the Migratory Bird Treaty Act (16 U.S.C. 704) contained in Service regulations in Chapter I, Subchapter B of Title 50 of the Code of Federal Regulations (CFR).

Title: Monitoring Recovered Species After Delisting as Required Under Section 4(g) of the Endangered Species Act—American Peregrine Falcon.

OMB Control Number: 1018–0101.

Form Numbers: FWS Forms 3–2307, 3–2308, and 3–2309.

Frequency of Collection: Monitoring is conducted every 3 years. For eggs and feathers, 15–20 of each are collected over a period of no more than 5 years.

Description of Respondents: The forms are filled out by professional biologists employed by Federal and State agencies and other organizations, and by volunteers that have been involved in past peregrine falcon conservation efforts. The egg and feather contaminants data sheets are filled out by biologists with permits to collect eggs and feathers at nest sites, as described in the Monitoring Plan, for contaminants monitoring.

Total Annual Burden Hours: 1,530.

FWS form No.	Total annual responses	Average burden hours per respondent	Annual burden hours
3–2307	1,482	1.0	1,482
3–2308	12	2.0	24
3–2309	12	2.0	24
Total	1,506	.....	1,530

FWS Form 3–2307 (Peregrine Falcon Monitoring Form) addresses the reporting requirements to record observations on the nesting pair, and the numbers of eggs and young during each nest visit. Each nest will be visited two (or more) times. FWS Form 3–2308 (Peregrine Falcon Egg Contaminants Data Sheet) addresses the reporting requirements to record data on eggs collected opportunistically during a nest visit. FWS Form 3–2309 (Peregrine Falcon Feather Contaminants Data Sheet) addresses the reporting requirements to record data on feathers collected opportunistically during a nest visit. Once collected, the eggs and feathers will be archived in a deep freeze for analysis at a later time.

We invite comments concerning this renewal on: (1) Whether or not the collection of information is necessary for the proper performance of monitoring of recovered species as prescribed in section 4(g) of the ESA, including whether or not the information will have practical utility; (2) the accuracy of our estimate of burden, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information for those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology; and (4) ways to minimize the burden of the collection of information on respondents. The information collections in this program will be part of a system of records covered by the Privacy Act (5 U.S.C. 552(a)).

Dated: December 22, 2004.

Hope Grey,

Information Collection Clearance Officer, Fish and Wildlife Service.

[FR Doc. 04–28745 Filed 12–30–04; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[AK–964–1410–HY–P; AA–6660–B, AA–6660–H, AA–6660–I, and AA–6660–A2; BBA–1]

Alaska Native Claims Selection

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of decision approving lands for conveyance.

SUMMARY: As required by 43 CFR 2650.7(d), notice is hereby given that an appealable decision approving lands for conveyance pursuant to the Alaska Native Claims Settlement Act will be issued to Becharof Corporation, for lands in T. 25 S., R. 47 W., T. 25 S., R. 49 W., T. 24 S., R. 50 W., T. 25 S., R. 50 W., Seward Meridian. Located in the vicinity of Egegik, Alaska, and containing 12,413.76 acres. Notice of the decision will also be published four times in the Bristol Bay Times.

DATES: The time limits for filing an appeal are:

1. Any party claiming a property interest which is adversely affected by the decision shall have until February 2, 2005, to file an appeal.

2. Parties receiving service of the decision by certified mail shall have 30 days from the date of receipt to file an appeal.

Parties who do not file an appeal in accordance with the requirements of 43 CFR part 4, subpart E, shall be deemed to have waived their rights.

ADDRESSES: A copy of the decision may be obtained from: Bureau of Land Management, Alaska State Office, 222 West Seventh Avenue, #13, Anchorage, Alaska 99513–7599.

FOR FURTHER INFORMATION, CONTACT: D. Kay Erben, by phone at 907–271–4515, or by e-mail at *Kay_Erben@ak.blm.gov.* Persons who use a telecommunication device (TTD) may call the Federal Information Relay Service (FIRS) on 1–800–877–8330, 24 hours a day, seven days a week, to contact Mrs. Erben.

D. Kay Erben,

Land Law Examiner, Branch of Adjudication II.

[FR Doc. 04–28711 Filed 12–30–04; 8:45 am]

BILLING CODE 4310–$$–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[UT–100–1610–DS]

Notice of Intent To Prepare an Environmental Impact Statement and Amend the St. George Field Office Resource Management Plan

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of intent.

SUMMARY: This document provides notice that the Bureau of Land Management (BLM) intends to prepare an amendment to the St. George Field Office Resource Management Plan (RMP) with an associated Environmental Impact Statement (EIS). The plan amendment will consider changes to Off Highway Vehicle (OHV) area designations, make minor modifications to the current transportation plan, and establish designation of routes for OHVs and other motorized vehicles. The planning area for the amendment includes all public lands within the St. George Field Office, which includes approximately 630,000 acres in Washington County, Utah. Preparation of this RMP amendment and EIS will fulfill the needs and obligations of the Federal Land Policy and Management Act of 1976 (FLPMA), the National Environmental Policy Act of 1969 (NEPA), applicable federal regulations, and BLM management policies.

DATES: This notice initiates the public scoping process. Comments on the scope of the plan, including issues that should be considered, should be submitted in writing to the address listed below within 30 days after the final public scoping meeting tentatively scheduled for the first week of January, 2005. However, collaboration with the public will continue throughout the plan amendment process. Dates and locations for public meetings will be announced through local news media, newsletters, and the plan amendment Web site, *http://www.stgeorgeohvplan.com,* at least 15 days prior to the events.

ADDRESSES: Please mail written comments to the BLM, St. George Field Office, ATTN: OHV Plan Amendment, 345 East Riverside Drive, St. George, Utah 84790; or submit comments electronically by e-mail to the Web site listed above. All public comments, including names and mailing addresses of respondents, will be available for public review at the St. George Field Office during regular business hours (7:45 a.m. to 4:30 p.m.) Monday through Friday, except holidays, and may be published as part of the EIS. Individual respondents may request confidentiality. If you wish to withhold your name or street address from public review or from disclosure under the Freedom of Information Act, please state so prominently at the beginning of your written correspondence. The BLM will honor such requests to the extent allowed by law. All submissions from organizations and businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be available for public inspection in their entirety.

FOR FURTHER INFORMATION CONTACT: For further information or to have your name added to the RMP amendment mailing list, contact Jim Crisp, RMP Team Leader, at the St. George Field Office at the address shown above or by telephone at 435–688–3201.

SUPPLEMENTARY INFORMATION: The St. George RMP planning area is located entirely within the boundaries of Washington County, Utah in the southwest corner of state. The area is bordered on the west by the Nevada state line, on the south by the Arizona state line, and on the east and north by Kane and Iron counties, respectively. Public lands within the St. George Field Office planning area are currently managed in accordance with the decisions in the 1999 St. George RMP and Record of Decision as amended. BLM will continue to manage OHV activities on these lands in accordance with the 1999 RMP until the plan amendment is completed and a Record of Decision is signed.

The use of public lands by motorized vehicles for recreation and other land use activities in Washington County, Utah is important to a wide variety of individuals, communities, groups, tribes, agencies, and business enterprises. Federal policy requires that BLM provide the public with sufficient information to ensure that motorized travel on public lands is conducted safely with due regard to protection of the environment and the rights of other land users and adjacent landowners. Completion of a comprehensive route designation plan (not included in the 1999 RMP) is necessary for agencies, law enforcement officials, and public land users to know where motorized travel is allowed or restricted. Preparation of this RMP amendment for the St. George Field Office is also necessary to comply with BLM's national OHV strategy and to implement recommendations of the Utah Natural Resource Coordinating Committee and BLM's Utah Resource Advisory Council on OHV management.

The BLM will work collaboratively with Washington County, various agencies, state and other local governments, Indian tribes, and interested parties to identify the management decisions that best address local, regional, and national needs and concerns. Early participation is encouraged in helping to determine future OHV management on public lands addressed in this amendment. The public scoping process will identify planning issues and provide for public comment on the development of planning criteria. Through consultation with numerous interested parties, BLM has identified the following preliminary issue themes:

1. Suitable access to public lands and resources.

2. Potential impacts to wildlife habitats, state and federally-listed plant and animal species, important watersheds, cultural resources, and lands managed for natural values.

3. Potential impacts to adjacent non-federal lands.

4. Meeting needs for motorized recreation opportunities including linked trail systems and trails designed specifically for single track and two track vehicles.

5. Potential impacts to local economies.

6. Consistency of OHV management across adjacent jurisdictions.

These preliminary issue themes may be supplemented or refined through public participation for consideration during the planning process. BLM will evaluate issues raised during scoping and place them in one of the following categories:

1. Issues to be resolved in the plan amendment;

2. Issues resolved through approved policy or administrative action; or

3. Issues beyond the scope of this plan amendment.

In evaluating issues and developing the plan amendment and EIS, BLM will use an interdisciplinary team of specialists and contractor personnel, in addition to cooperating agencies approved under written agreement. Disciplines involved in the process will include, at the minimum, specialists with expertise in wildlife, outdoor recreation, archeology, realty, rangeland management, watershed, endangered species, natural area management, social and economic analysis, law enforcement, and fire.

In addition to the scoping period, BLM will provide formal opportunities

for public comment upon publication of the draft RMP amendment/draft EIS.

Dated: October 20, 2004.

Gene Terland,

Associate State Director.

[FR Doc. 04–28744 Filed 12–30–04; 8:45 am]

BILLING CODE 4310–88–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WY–100–05–1310–DB]

Notice of Meeting of the Pinedale Anticline Working Group's Cultural and Historic Task Group

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of public meeting and cancellation.

SUMMARY: In accordance with the Federal Land Policy and Management Act (1976) and the Federal Advisory Committee Act (1972), the U.S. Department of the Interior, Bureau of Land Management (BLM) Pinedale Anticline Working Group (PAWG) Cultural and Historic Task Group (subcommittee) will meet in Pinedale, Wyoming, for a business meeting. Task Group meetings are open to the public.

DATES: A PAWG Cultural and Historic Task Group meeting is scheduled for February 3, 2005, from 5 p.m. until 9 p.m.

ADDRESSES: The PAWG Cultural and Historic Task Group meeting will be held in the BLM Pinedale Field Office conference room at 432 E. Mill St., Pinedale, WY.

FOR FURTHER INFORMATION CONTACT: Dave Vlcek at 307–367–5327 or Kierson Crume at 307–367–5343, BLM/Cultural and Historic TG Liaisons, Bureau of Land Management, Pinedale Field Office, 432 E Mills St., P.O. Box 768, Pinedale, WY, 82941.

SUPPLEMENTARY INFORMATION: The Pinedale Anticline Working Group (PAWG) was authorized and established with release of the Record of Decision (ROD) for the Pinedale Anticline Oil and Gas Exploration and Development Project on July 27, 2000. The PAWG advises the BLM on the development and implementation of monitoring plans and adaptive management decisions as development of the Pinedale Anticline Natural Gas Field (PAPA) proceeds for the life of the field.

After the ROD was issued, Interior determined that a Federal Advisory Committees Act (FACA) charter was required for this group. The charter was signed by Secretary of the Interior, Gale Norton, on August 15, 2002, and renewed on August 13, 2004. An announcement of committee initiation and call for nominations was published in the **Federal Register** on February 21, 2003, (68 FR 8522). PAWG members were appointed by Secretary Norton on May 4, 2004.

At their second business meeting, the PAWG established seven resource-or activity-specific Task Groups, including one for cultural and historic. Public participation on the Task Groups was solicited through the media, letters, and word-of-mouth.

The agenda for these meetings will include information gathering and discussion related to developing a reclamation monitoring plan to assess the impacts of development in the Pinedale Anticline gas field, and identifying who will do and who will pay for the monitoring. Task Group recommendations are due to the PAWG in February, 2005. At a minimum, public comments will be heard just prior to adjournment of the meeting.

Dated: December 21, 2004.

Priscilla E. Mecham,

Field Office Manager.

[FR Doc. 04–28642 Filed 12–30–04; 8:45 am]

BILLING CODE 4310–22–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WY–100–05–1310–DB]

Notice of Meeting of the Pinedale Anticline Working Group's Wildlife Task Group

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act (1976) and the Federal Advisory Committee Act (1972), the U.S. Department of the Interior, Bureau of Land Management (BLM) Pinedale Anticline Working Group (PAWG) Wildlife Task Group (subcommittee) will meet in Pinedale, Wyoming, for a business meeting. Task Group meetings are open to the public.

DATES: A PAWG Wildlife Task Group meeting is scheduled for January 27, 2005, from 9 a.m. until 4 p.m. A second Task Group meeting is scheduled for February 8, 2005, from 9 a.m. until 4 p.m.

ADDRESSES: The January 27 meeting of the PAWG Wildlife Task Group will be held in the Lovatt room of the Pinedale Library at 155 S. Tyler Ave., Pinedale, WY. The February 8 meeting will be held in the conference room of the BLM at 432 E. Mill St., Pinedale, WY.

FOR FURTHER INFORMATION CONTACT: Steve Belinda, BLM/Wildlife TG Liaison, Bureau of Land Management, Pinedale Field Office, 432 E. Mills St., P.O. Box 768, Pinedale, WY, 82941; 307–367–5323.

SUPPLEMENTARY INFORMATION: The Pinedale Anticline Working Group (PAWG) was authorized and established with release of the Record of Decision (ROD) for the Pinedale Anticline Oil and Gas Exploration and Development Project on July 27, 2000. The PAWG advises the BLM on the development and implementation of monitoring plans and adaptive management decisions as development of the Pinedale Anticline Natural Gas Field (PAPA) proceeds for the life of the field.

After the ROD was issued, Interior determined that a Federal Advisory Committees Act (FACA) charter was required for this group. The charter was signed by Secretary of the Interior, Gale Norton, on August 15, 2002, and renewed on August 13, 2004. An announcement of committee initiation and call for nominations was published in the **Federal Register** on February 21, 2003, (68 FR 8522). PAWG members were appointed by Secretary Norton on May 4, 2004.

At their second business meeting, the PAWG established seven resource- or activity-specific Task Groups, including one for Wildlife. Public participation on the Task Groups was solicited through the media, letters, and word-of-mouth.

The agenda for this meeting will include information gathering and discussion related to developing a wildlife monitoring plan to assess the impacts of development in the Pinedale Anticline gas field, and identifying who will do and who will pay for the monitoring. Task Group recommendations are due to the PAWG in February, 2005. At a minimum, public comments will be heard just prior to adjournment of the meeting.

Dated: December 22, 2004.

Priscilla E. Mecham,

Field Office Manager.

[FR Doc. 04–28643 Filed 12–30–04; 8:45 am]

BILLING CODE 4310–22–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[UT–910–05–1040–PH–24–1A]

Notice of Utah Resource Advisory Council and Grand Staircase-Escalante National Monument Advisory Committee Meetings

AGENCY: Bureau of Land Management, Department of Interior.

ACTION: Notice of Utah Resource Advisory Council (RAC) and Grand Staircase-Escalante National Monument Advisory Council (GSENMAC) meetings.

SUMMARY: In accordance with the Federal Land Policy and Management Act (FLPMA) and the Federal Advisory Committee Act of 1972 (FACA), the U.S. Department of the Interior, Bureau of Land Management (BLM) Utah Resource Advisory Council (RAC) and the Grand Staircase-Escalante National Monument Advisory Committee (GSENMAC) will meet as indicated below.

DATES: The Utah Resource Advisory Council (RAC) and Grand Staircase-Escalante National Monument's Advisory Committee (GSENMAC) will meet January 26–27, 2005, in Kanab, Utah.

The RAC will meet January 26 from 1 p.m.–5 p.m. at the GSENM's headquarters conference room located at 190 East Center Street, Kanab. A half-hour public comment period is scheduled to begin at 4:15 p.m. Written comments may be sent to the Bureau of Land Management address listed below.

On January 26, the GSENMAC will met at the Kanab City Library's multi-purpose conference room from 9:30 a.m. until 6 p.m. The library is located at 374 North Main Street, Kanab. A public comment period has been scheduled from 5 p.m.–6 p.m. Written comments may be sent to the GSENM at the address listed below.

On January 27, from 8 a.m. until noon, the RAC and GSENMAC will have a joint meeting at the Kanab City Library's multi-purpose conference room. The GSENMAC will continue their meeting until 4:30 p.m.

FOR FURTHER INFORMATION CONTACT: Sherry Foot, Special Programs Coordinator, Utah State Office, Bureau of Land Management, 324 South State Street, Salt Lake City, Utah, 84111; phone (801) 539–4195, or Allysia Angus, Landscape Architect/Land Use Planner, GSENM Headquarters Office, 190 E. Center Street, Kanab, Utah, 84741; phone (435) 644–4388.

SUPPLEMENTARY INFORMATION: On January 26, the RAC will be discussing their role in the process of reviewing transportation plans for future RMPs; improving RMP communications; follow-up discussion on the letter sent to the Congressional Delegation and the letter sent by the San Rafael Swell subgroup to the Price Field Office commenting on their draft RMP; and, a presentation on the cooperative management of the Coral Pink Sand Dunes.

Also, on January 26, the GSENMAC will be discussing grazing issues; Monument updates and emerging issues (budget specifics); EIS; grazing subcommittee final draft; science subcommittee final draft; and, a discussion on education and outreach.

On January 27, the GSENMAC and RAC will have a joint meeting to discuss the history and roles of the GSENMAC and RAC, along with addressing current issues and accomplishments. A short course on Utah's Water Laws will be given, and an overview of What's Happening in Utah. The GSENMAC will continue their meeting until 4:30 p.m.

All meetings are open to the public; however, transportation, lodging, and meals are the responsibility of the participating public.

Dated: December 21, 2004.

Sally Wisely,

Director.

[FR Doc. 04–28662 Filed 12–30–04; 8:45 am]

BILLING CODE 4310–$$–M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[OR–957–00–1420–BJ: GP05–0037]

Filing of Plats of Survey: Oregon/Washington

AGENCY: Bureau of Land Management.

ACTION: Notice.

SUMMARY: The plats of survey of the following described lands were officially filed in the Oregon State Office, Portland, Oregon, on October 13, 2004.

Willamette Meridian

Oregon

T. 28 S., R. 11 W., accepted, July 30, 2004.
T. 38 S., R. 5 W., accepted, July 30, 2004.
T. 37 S., R. 4 W., accepted, July 30, 2004.
T. 27 S., R. 9 W., accepted August 6, 2004.
T. 26 S., R. 9 W., accepted August 6, 2004.
T. 20 S., R. 29 E., accepted September 7, 2004.
T. 37 S., R. 20 E., accepted September 7, 2004.
T. 6 N., Rgs. 31 & 32 E., accepted September 7, 2004.
T. 2 N., R. 33 E., accepted September 7, 2004.
T. 15 S., R. 2 W. accepted September 7, 2004.

Washington

T. 4 N., R. 10 E., accepted July 30, 2004.
T. 22 N., R. 10 W., accepted September 7, 2004.

The plats of survey of the following described lands were officially filed in the Oregon State Office, Portland, Oregon, on November 3, 2004.

Oregon

T. 2 N., R. 36 E., accepted September 27, 2004.
T. 22 S., R. 7 S., accepted September 13, 2004.
T. 26 S., R. 7 W., accepted September 13, 2004.
T. 26 S., R. 8 W., accepted September 13, 2004.

Washington

T. 24 N., R. 12 W., accepted October 22, 2004.

The plats of survey of the following described lands were officially filed in the Oregon State Office, Portland, Oregon, on November 16, 2004.

Oregon

T. 29 S., R. 9 W., accepted October 22, 2004.
T. 30 S., R. 9 W., accepted October 22, 2004.
T. 16 S., R. 7 W., accepted November 1, 2004.

Washington

T. 23 N., R. 12 W., accepted October 22, 2004.
T. 15 N., R. 23 E., accepted October 26, 2004.
T. 16 N., R. 23 E., accepted October 26, 2004.

A copy of the plat may be obtained from the Public Room at the Oregon State Office, Bureau of Land Management, 333 S.W. 1st Avenue, Portland, Oregon 97204, upon required payment. A person or party who wishes to protest against a survey must file a notice that they wish to protest. (at the above address) with the State Director, Bureau of Land Management, Portland, Oregon.

FOR FURTHER INFORMATION CONTACT: Chief, Branch of Geographic Sciences, Bureau of Land Management, (333 S.W. 1st Avenue) P.O. Box 2965, Portland, Oregon 97208.

Dated: December 21, 2004.

Robert D. DeViney, Jr.,

Branch of Realty and Records Services.

[FR Doc. 04–28641 Filed 12–30–04; 8:45 am]

BILLING CODE 4310–33–P

INTERNATIONAL TRADE COMMISSION

[Investigations Nos. 701–TA–202, 731–TA–103, and 731–TA–514 (Second Review)]

Cotton Shop Towels From Bangladesh, China, and Pakistan

AGENCY: United States International Trade Commission.

ACTION: Institution of five-year reviews concerning the countervailing duty

order on cotton shop towels from Pakistan and the antidumping duty orders on cotton shop towels from Bangladesh and China.

SUMMARY: The Commission hereby gives notice that it has instituted reviews pursuant to section 751(c) of the Tariff Act of 1930 (19 U.S.C. 1675(c)) (the Act) to determine whether revocation of the countervailing duty order on cotton shop towels from Pakistan and the antidumping duty orders on cotton shop towels from Bangladesh and China would be likely to lead to continuation or recurrence of material injury. Pursuant to section 751(c)(2) of the Act, interested parties are requested to respond to this notice by submitting the information specified below to the Commission; [1] to be assured of consideration, the deadline for responses is February 22, 2005. Comments on the adequacy of responses may be filed with the Commission by March 18, 2005. For further information concerning the conduct of these reviews and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A, D, E, and F (19 CFR part 207).

DATES: *Effective Date:* January 3, 2005.

FOR FURTHER INFORMATION CONTACT: Mary Messer (202–205–3193), Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for these reviews may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov*.

SUPPLEMENTARY INFORMATION:

Background. On October 4, 1983, the Department of Commerce (''Commerce'') issued an antidumping duty order on imports of cotton shop towels from China (48 FR 45277). On March 9, 1984, Commerce issued a countervailing duty order on imports of cotton shop towels from Pakistan (49 FR 8974). On March 20, 1992, Commerce issued an antidumping duty order on imports of cotton shop towels from Bangladesh (57 FR 9688). Following five-year reviews by Commerce and the Commission, effective February 17, 2000, Commerce issued continuations of the countervailing duty order on imports of cotton shop towels from Pakistan and the antidumping duty orders on imports of cotton shop towels from Bangladesh and China (65 FR 8119). The Commission is now conducting second reviews to determine whether revocation of the orders would be likely to lead to continuation or recurrence of material injury to the domestic industry within a reasonably foreseeable time. It will assess the adequacy of interested party responses to this notice of institution to determine whether to conduct full reviews or expedited reviews. The Commission's determinations in any expedited reviews will be based on the facts available, which may include information provided in response to this notice.

Definitions. The following definitions apply to these reviews:

(1) *Subject Merchandise* is the class or kind of merchandise that is within the scope of the five-year reviews, as defined by Commerce.

(2) The *Subject Countries* in these reviews are Bangladesh, China, and Pakistan.

(3) The *Domestic Like Product* is the domestically produced product or products which are like, or in the absence of like, most similar in characteristics and uses with, the Subject Merchandise. In each of the original determinations and its full five-year review determinations, the Commission defined the Domestic Like Product as all shop towels. The Commission has expressly explained that this definition includes shop towels whether cotton or a cotton blend, whether of domestic or imported fabric, and whether greige, dyed, treated with soil-release features, or imprinted with customer names or logos.

(4) The *Domestic Industry* is the U.S. producers as a whole of the Domestic Like Product, or those producers whose collective output of the Domestic Like Product constitutes a major proportion of the total domestic production of the product. In its original determinations concerning China and Pakistan, the Commission defined the Domestic Industry as all producers of shop towels. In its original determination concerning Bangladesh, the Commission defined the Domestic Industry as all producers of shop towels, including integrated producers, converters, and toll producers. In its full five-year review determinations, the Commission determined the Domestic Industry to consist of all producers of shop towels.

(5) An *Importer* is any person or firm engaged, either directly or through a parent company or subsidiary, in importing the Subject Merchandise into the United States from a foreign manufacturer or through its selling agent.

Participation in the reviews and public service list.—Persons, including industrial users of the Subject Merchandise and, if the merchandise is sold at the retail level, representative consumer organizations, wishing to participate in the reviews as parties must file an entry of appearance with the Secretary to the Commission, as provided in section 201.11(b)(4) of the Commission's rules, no later than 21 days after publication of this notice in the **Federal Register**. The Secretary will maintain a public service list containing the names and addresses of all persons, or their representatives, who are parties to the reviews.

Former Commission employees who are seeking to appear in Commission five-year reviews are reminded that they are required, pursuant to 19 CFR 201.15, to seek Commission approval if the matter in which they are seeking to appear was pending in any manner or form during their Commission employment. The Commission is seeking guidance as to whether a second transition five-year review is the ''same particular matter'' as the underlying original investigation for purposes of 19 CFR 201.15 and 18 U.S.C. 207, the post employment statute for Federal employees. Former employees may seek informal advice from Commission ethics officials with respect to this and the related issue of whether the employee's participation was ''personal and substantial.'' However, any informal consultation will not relieve former employees of the obligation to seek approval to appear from the Commission under its rule 201.15. For ethics advice, contact Carol McCue Verratti, Deputy Agency Ethics Official, at 202–205–3088.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and APO service list. Pursuant to section 207.7(a) of the Commission's rules, the Secretary will make BPI submitted in these reviews available to authorized applicants under the APO

[1] No response to this request for information is required if a currently valid Office of Management and Budget (OMB) number is not displayed; the OMB number is 3117–0016/USITC No. 05–5–104, expiration date June 30, 2005. Public reporting burden for the request is estimated to average 7 hours per response. Please send comments regarding the accuracy of this burden estimate to the Office of Investigations, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436.

issued in the reviews, provided that the application is made no later than 21 days after publication of this notice in the **Federal Register**. Authorized applicants must represent interested parties, as defined in 19 U.S.C. 1677(9), who are parties to the reviews. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Certification. Pursuant to section 207.3 of the Commission's rules, any person submitting information to the Commission in connection with these reviews must certify that the information is accurate and complete to the best of the submitter's knowledge. In making the certification, the submitter will be deemed to consent, unless otherwise specified, for the Commission, its employees, and contract personnel to use the information provided in any other reviews or investigations of the same or comparable products which the Commission conducts under Title VII of the Act, or in internal audits and investigations relating to the programs and operations of the Commission pursuant to 5 U.S.C. Appendix 3.

Written submissions. Pursuant to section 207.61 of the Commission's rules, each interested party response to this notice must provide the information specified below. The deadline for filing such responses is February 22, 2005. Pursuant to section 207.62(b) of the Commission's rules, eligible parties (as specified in Commission rule 207.62(b)(1)) may also file comments concerning the adequacy of responses to the notice of institution and whether the Commission should conduct expedited or full reviews. The deadline for filing such comments is March 18, 2005. All written submissions must conform with the provisions of sections 201.8 and 207.3 of the Commission's rules and any submissions that contain BPI must also conform with the requirements of sections 201.6 and 207.7 of the Commission's rules. The Commission's rules do not authorize filing of submissions with the Secretary by facsimile or electronic means, except to the extent permitted by section 201.8 of the Commission's rules, as amended, 67 FR 68036 (November 8, 2002). Also, in accordance with sections 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the reviews must be served on all other parties to the reviews (as identified by either the public or APO service list as appropriate), and a certificate of service must accompany the document (if you are not a party to the reviews you do not need to serve your response).

Inability to provide requested information. Pursuant to section 207.61(c) of the Commission's rules, any interested party that cannot furnish the information requested by this notice in the requested form and manner shall notify the Commission at the earliest possible time, provide a full explanation of why it cannot provide the requested information, and indicate alternative forms in which it can provide equivalent information. If an interested party does not provide this notification (or the Commission finds the explanation provided in the notification inadequate) and fails to provide a complete response to this notice, the Commission may take an adverse inference against the party pursuant to section 776(b) of the Act in making its determinations in the reviews.

Information To Be Provided in Response to This Notice of Institution: If you are a domestic producer, union/worker group, or trade/business association; import/export Subject Merchandise from more than one Subject Country; or produce Subject Merchandise in more than one Subject Country, you may file a single response. If you do so, please ensure that your response to each question includes the information requested for each pertinent Subject Country. As used below, the term ''firm'' includes any related firms.

(1) The name and address of your firm or entity (including World Wide Web address if available) and name, telephone number, fax number, and E-mail address of the certifying official.

(2) A statement indicating whether your firm/entity is a U.S. producer of the Domestic Like Product, a U.S. union or worker group, a U.S. importer of the Subject Merchandise, a foreign producer or exporter of the Subject Merchandise, a U.S. or foreign trade or business association, or another interested party (including an explanation). If you are a union/worker group or trade/business association, identify the firms in which your workers are employed or which are members of your association.

(3) A statement indicating whether your firm/entity is willing to participate in these reviews by providing information requested by the Commission.

(4) A statement of the likely effects of the revocation of the countervailing duty order and/or revocation of the antidumping duty orders on the Domestic Industry in general and/or your firm/entity specifically. In your response, please discuss the various factors specified in section 752(a) of the Act (19 U.S.C. 1675a(a)) including the likely volume of subject imports, likely price effects of subject imports, and likely impact of imports of Subject Merchandise on the Domestic Industry.

(5) A list of all known and currently operating U.S. producers of the Domestic Like Product. Identify any known related parties and the nature of the relationship as defined in section 771(4)(B) of the Act (19 U.S.C. 1677(4)(B)).

(6) A list of all known and currently operating U.S. importers of the Subject Merchandise and producers of the Subject Merchandise in each Subject Country that currently export or have exported Subject Merchandise to the United States or other countries after 1998.

(7) If you are a U.S. producer of the Domestic Like Product, provide the following information on your firm's operations on that product during calendar year 2004 (report quantity data in number of towels and value data in U.S. dollars, f.o.b. plant). If you are a union/worker group or trade/business association, provide the information, on an aggregate basis, for the firms in which your workers are employed/which are members of your association.

(a) Production (quantity) and, if known, an estimate of the percentage of total U.S. production of the Domestic Like Product accounted for by your firm's(s') production;

(b) the quantity and value of U.S. commercial shipments of the Domestic Like Product produced in your U.S. plant(s); and

(c) the quantity and value of U.S. internal consumption/company transfers of the Domestic Like Product produced in your U.S. plant(s).

(8) If you are a U.S. importer or a trade/business association of U.S. importers of the Subject Merchandise from the Subject Country(ies), provide the following information on your firm's(s') operations on that product during calendar year 2004 (report quantity data in number of towels and value data in U.S. dollars). If you are a trade/business association, provide the information, on an aggregate basis, for the firms which are members of your association.

(a) The quantity and value (landed, duty-paid but not including antidumping or countervailing duties) of U.S. imports and, if known, an estimate of the percentage of total U.S. imports of Subject Merchandise from each Subject Country accounted for by your firm's(s') imports;

(b) the quantity and value (f.o.b. U.S. port, including antidumping and/or countervailing duties) of U.S. commercial shipments of Subject Merchandise imported from each Subject Country; and

(c) the quantity and value (f.o.b. U.S. port, including antidumping and/or countervailing duties) of U.S. internal consumption/company transfers of Subject Merchandise imported from each Subject Country.

(9) If you are a producer, an exporter, or a trade/business association of producers or exporters of the Subject Merchandise in the Subject Country(ies), provide the following information on your firm's(s') operations on that product during calendar year 2004 (report quantity data in number of towels and value data in U.S. dollars, landed and duty-paid at the U.S. port but not including antidumping or countervailing duties). If you are a trade/business association, provide the information, on an aggregate basis, for the firms which are members of your association.

(a) Production (quantity) and, if known, an estimate of the percentage of total production of Subject Merchandise in each Subject Country accounted for by your firm's(s') production; and

(b) the quantity and value of your firm's(s') exports to the United States of Subject Merchandise and, if known, an estimate of the percentage of total exports to the United States of Subject Merchandise from each Subject Country accounted for by your firm's(s') exports.

(10) Identify significant changes, if any, in the supply and demand conditions or business cycle for the Domestic Like Product that have occurred in the United States or in the market for the Subject Merchandise in the Subject Country(ies) after 1998, and significant changes, if any, that are likely to occur within a reasonably foreseeable time. Supply conditions to consider include technology; production methods; development efforts; ability to increase production (including the shift of production facilities used for other products and the use, cost, or availability of major inputs into production); and factors related to the ability to shift supply among different national markets (including barriers to importation in foreign markets or changes in market demand abroad). Demand conditions to consider include end uses and applications; the existence and availability of substitute products; and the level of competition among the Domestic Like Product produced in the United States, Subject Merchandise produced in each Subject Country, and such merchandise from other countries.

(11) (Optional) A statement of whether you agree with the above definitions of the Domestic Like Product and Domestic Industry; if you disagree with either or both of these definitions, please explain why and provide alternative definitions.

Authority: These reviews are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.61 of the Commission's rules.

Issued: December 20, 2004.

By order of the Commission.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 04–28729 Filed 12–30–04; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–814 (Review)]

Creatine Monohydrate From China

AGENCY: United States International Trade Commission.

ACTION: Institution of a five-year review concerning the antidumping duty order on creatine monohydrate from China.

SUMMARY: The Commission hereby gives notice that it has instituted a review pursuant to section 751(c) of the Tariff Act of 1930 (19 U.S.C. 1675(c)) (the Act) to determine whether revocation of the antidumping duty order on creatine monohydrate from China would be likely to lead to continuation or recurrence of material injury. Pursuant to section 751(c)(2) of the Act, interested parties are requested to respond to this notice by submitting the information specified below to the Commission; [1] to be assured of consideration, the deadline for responses is February 22, 2005. Comments on the adequacy of responses may be filed with the Commission by March 18, 2005. For further information concerning the conduct of this review and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A, D, E, and F (19 CFR part 207).

EFFECTIVE DATE: January 3, 2005.

FOR FURTHER INFORMATION CONTACT: Mary Messer (202–205–3193), Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for this review may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov*.

SUPPLEMENTARY INFORMATION:

Background. On February 4, 2000, the Department of Commerce issued an antidumping duty order on imports of creatine monohydrate from China (65 FR 5583). The Commission is conducting a review to determine whether revocation of the order would be likely to lead to continuation or recurrence of material injury to the domestic industry within a reasonably foreseeable time. It will assess the adequacy of interested party responses to this notice of institution to determine whether to conduct a full review or an expedited review. The Commission's determination in any expedited review will be based on the facts available, which may include information provided in response to this notice.

Definitions. The following definitions apply to this review:

(1) *Subject Merchandise* is the class or kind of merchandise that is within the scope of the five-year review, as defined by the Department of Commerce.

(2) The *Subject Country* in this review is China.

(3) The *Domestic Like Product* is the domestically produced product or products which are like, or in the absence of like, most similar in characteristics and uses with, the *Subject Merchandise*. In its original determination, the Commission defined the *Domestic Like Product* as creatine monohydrate.

(4) The *Domestic Industry* is the U.S. producers as a whole of the *Domestic Like Product*, or those producers whose collective output of the *Domestic Like Product* constitutes a major proportion of the total domestic production of the product. In its original determination, the Commission defined the *Domestic Industry* as all domestic producers of creatine monohydrate, with the exception of one related party.

(5) The *Order Date* is the date that the antidumping duty order under review became effective. In this review, the *Order Date* is February 4, 2000.

[1] No response to this request for information is required if a currently valid Office of Management and Budget (OMB) number is not displayed; the OMB number is 3117–0016/USITC No. 05–5–105, expiration date June 30, 2005. Public reporting burden for the request is estimated to average 7 hours per response. Please send comments regarding the accuracy of this burden estimate to the Office of Investigations, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436.

(6) An *Importer* is any person or firm engaged, either directly or through a parent company or subsidiary, in importing the *Subject Merchandise* into the United States from a foreign manufacturer or through its selling agent.

Participation in the review and public service list. Persons, including industrial users of the *Subject Merchandise* and, if the merchandise is sold at the retail level, representative consumer organizations, wishing to participate in the review as parties must file an entry of appearance with the Secretary to the Commission, as provided in section 201.11(b)(4) of the Commission's rules, no later than 21 days after publication of this notice in the **Federal Register**. The Secretary will maintain a public service list containing the names and addresses of all persons, or their representatives, who are parties to the review.

Former Commission employees who are seeking to appear in Commission five-year reviews are reminded that they are required, pursuant to 19 CFR 201.15, to seek Commission approval if the matter in which they are seeking to appear was pending in any manner or form during their Commission employment. The Commission's designated agency ethics official has advised that a five-year review is the ''same particular matter'' as the underlying original investigation for purposes of 19 CFR 201.15 and 18 U.S.C. 207, the post employment statute for Federal employees. Former employees may seek informal advice from Commission ethics officials with respect to this and the related issue of whether the employee's participation was ''personal and substantial.'' However, any informal consultation will not relieve former employees of the obligation to seek approval to appear from the Commission under its rule 201.15. For ethics advice, contact Carol McCue Verratti, Deputy Agency Ethics Official, at 202–205–3088.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and APO service list. Pursuant to section 207.7(a) of the Commission's rules, the Secretary will make BPI submitted in this review available to authorized applicants under the APO issued in the review, provided that the application is made no later than 21 days after publication of this notice in the **Federal Register**. Authorized applicants must represent interested parties, as defined in 19 U.S.C. 1677(9), who are parties to the review. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Certification. Pursuant to section 207.3 of the Commission's rules, any person submitting information to the Commission in connection with this review must certify that the information is accurate and complete to the best of the submitter's knowledge. In making the certification, the submitter will be deemed to consent, unless otherwise specified, for the Commission, its employees, and contract personnel to use the information provided in any other reviews or investigations of the same or comparable products which the Commission conducts under Title VII of the Act, or in internal audits and investigations relating to the programs and operations of the Commission pursuant to 5 U.S.C. Appendix 3.

Written submissions. Pursuant to section 207.61 of the Commission's rules, each interested party response to this notice must provide the information specified below. The deadline for filing such responses is February 22, 2005. Pursuant to section 207.62(b) of the Commission's rules, eligible parties (as specified in Commission rule 207.62(b)(1)) may also file comments concerning the adequacy of responses to the notice of institution and whether the Commission should conduct an expedited or full review. The deadline for filing such comments is March 18, 2005. All written submissions must conform with the provisions of sections 201.8 and 207.3 of the Commission's rules and any submissions that contain BPI must also conform with the requirements of sections 201.6 and 207.7 of the Commission's rules. The Commission's rules do not authorize filing of submissions with the Secretary by facsimile or electronic means, except to the extent permitted by section 201.8 of the Commission's rules, as amended, 67 FR 68036 (November 8, 2002). Also, in accordance with sections 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the review must be served on all other parties to the review (as identified by either the public or APO service list as appropriate), and a certificate of service must accompany the document (if you are not a party to the review you do not need to serve your response).

Inability to provide requested information. Pursuant to section 207.61(c) of the Commission's rules, any interested party that cannot furnish the information requested by this notice in the requested form and manner shall notify the Commission at the earliest possible time, provide a full explanation of why it cannot provide the requested information, and indicate alternative forms in which it can provide equivalent information. If an interested party does not provide this notification (or the Commission finds the explanation provided in the notification inadequate) and fails to provide a complete response to this notice, the Commission may take an adverse inference against the party pursuant to section 776(b) of the Act in making its determination in the review.

Information To Be Provided in Response to This Notice of Institution: As used below, the term ''firm'' includes any related firms.

(1) The name and address of your firm or entity (including World Wide Web address if available) and name, telephone number, fax number, and E-mail address of the certifying official.

(2) A statement indicating whether your firm/entity is a U.S. producer of the *Domestic Like Product*, a U.S. union or worker group, a U.S. importer of the *Subject Merchandise*, a foreign producer or exporter of the *Subject Merchandise*, a U.S. or foreign trade or business association, or another interested party (including an explanation). If you are a union/worker group or trade/business association, identify the firms in which your workers are employed or which are members of your association.

(3) A statement indicating whether your firm/entity is willing to participate in this review by providing information requested by the Commission.

(4) A statement of the likely effects of the revocation of the antidumping duty order on the *Domestic Industry* in general and/or your firm/entity specifically. In your response, please discuss the various factors specified in section 752(a) of the Act (19 U.S.C. 1675a(a)) including the likely volume of subject imports, likely price effects of subject imports, and likely impact of imports of *Subject Merchandise* on the *Domestic Industry*.

(5) A list of all known and currently operating U.S. producers of the *Domestic Like Product*. Identify any known related parties and the nature of the relationship as defined in section 771(4)(B) of the Act (19 U.S.C. 1677(4)(B)).

(6) A list of all known and currently operating U.S. importers of the *Subject Merchandise* and producers of the *Subject Merchandise* in the *Subject Country* that currently export or have exported *Subject Merchandise* to the United States or other countries since the *Order Date*.

(7) If you are a U.S. producer of the *Domestic Like Product*, provide the following information on your firm's operations on that product during calendar year 2004 (report quantity data

in kilograms and value data in U.S. dollars, f.o.b. plant). If you are a union/worker group or trade/business association, provide the information, on an aggregate basis, for the firms in which your workers are employed/which are members of your association.

(a) Production (quantity) and, if known, an estimate of the percentage of total U.S. production of the *Domestic Like Product* accounted for by your firm's(s') production;

(b) the quantity and value of U.S. commercial shipments of the *Domestic Like Product* produced in your U.S. plant(s); and

(c) the quantity and value of U.S. internal consumption/company transfers of the *Domestic Like Product* produced in your U.S. plant(s).

(8) If you are a U.S. importer or a trade/business association of U.S. importers of the *Subject Merchandise* from the *Subject Country*, provide the following information on your firm's(s') operations on that product during calendar year 2004 (report quantity data in kilograms and value data in U.S. dollars). If you are a trade/business association, provide the information, on an aggregate basis, for the firms which are members of your association.

(a) The quantity and value (landed, duty-paid but not including antidumping duties) of U.S. imports and, if known, an estimate of the percentage of total U.S. imports of *Subject Merchandise* from the *Subject Country* accounted for by your firm's(s') imports;

(b) the quantity and value (f.o.b. U.S. port, including antidumping duties) of U.S. commercial shipments of *Subject Merchandise* imported from the *Subject Country;* and

(c) the quantity and value (f.o.b. U.S. port, including antidumping duties) of U.S. internal consumption/company transfers of *Subject Merchandise* imported from the *Subject Country.*

(9) If you are a producer, an exporter, or a trade/business association of producers or exporters of the *Subject Merchandise* in the *Subject Country,* provide the following information on your firm's(s') operations on that product during calendar year 2004 (report quantity data in kilograms and value data in U.S. dollars, landed and duty-paid at the U.S. port but not including antidumping duties). If you are a trade/business association, provide the information, on an aggregate basis, for the firms which are members of your association.

(a) Production (quantity) and, if known, an estimate of the percentage of total production of *Subject Merchandise* in the *Subject Country* accounted for by your firm's(s') production; and

(b) the quantity and value of your firm's(s') exports to the United States of *Subject Merchandise* and, if known, an estimate of the percentage of total exports to the United States of *Subject Merchandise* from the *Subject Country* accounted for by your firm's(s') exports.

(10) Identify significant changes, if any, in the supply and demand conditions or business cycle for the *Domestic Like Product* that have occurred in the United States or in the market for the *Subject Merchandise* in the *Subject Country* since the *Order Date,* and significant changes, if any, that are likely to occur within a reasonably foreseeable time. Supply conditions to consider include technology; production methods; development efforts; ability to increase production (including the shift of production facilities used for other products and the use, cost, or availability of major inputs into production); and factors related to the ability to shift supply among different national markets (including barriers to importation in foreign markets or changes in market demand abroad). Demand conditions to consider include end uses and applications; the existence and availability of substitute products; and the level of competition among the *Domestic Like Product* produced in the United States, *Subject Merchandise* produced in the *Subject Country,* and such merchandise from other countries.

(11) (Optional) A statement of whether you agree with the above definitions of the *Domestic Like Product* and *Domestic Industry;* if you disagree with either or both of these definitions, please explain why and provide alternative definitions.

Authority: This review is being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.61 of the Commission's rules.

Issued: December 20, 2004.

By order of the Commission.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 04–28728 Filed 12–30–04; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigations Nos. 701–TA–388–391 and 731–TA–816–821 (Review)]

Cut-to-Length Carbon Steel Plate From France, India, Indonesia, Italy, Japan, and Korea

AGENCY: International Trade Commission.

ACTION: Institution of five-year reviews concerning the countervailing duty orders on cut-to-length (''CTL'') carbon steel plate from India, Indonesia, Italy, and Korea and the antidumping duty orders on CTL carbon steel plate from France, India, Indonesia, Italy, Japan, and Korea.

SUMMARY: The Commission hereby gives notice that it has instituted reviews pursuant to section 751(c) of the Tariff Act of 1930 (19 U.S.C. 1675(c)) (the Act) to determine whether revocation of the countervailing duty orders on CTL carbon steel plate from India, Indonesia, Italy, and Korea and the antidumping duty orders on CTL carbon steel plate from France, India, Indonesia, Italy, Japan, and Korea would be likely to lead to continuation or recurrence of material injury. Pursuant to section 751(c)(2) of the Act, interested parties are requested to respond to this notice by submitting the information specified below to the Commission; [1] to be assured of consideration, the deadline for responses is February 22, 2005. Comments on the adequacy of responses may be filed with the Commission by March 18, 2005. For further information concerning the conduct of these reviews and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A, D, E, and F (19 CFR part 207).

EFFECTIVE DATE: January 3, 2005.

FOR FURTHER INFORMATION CONTACT: Mary Messer (202–205–3193), Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–

[1] No response to this request for information is required if a currently valid Office of Management and Budget (OMB) number is not displayed; the OMB number is 3117–0016/USITC No. 05–5–106, expiration date June 30, 2005. Public reporting burden for the request is estimated to average 7 hours per response. Please send comments regarding the accuracy of this burden estimate to the Office of Investigations, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436.

205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for these reviews may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION:

Background. On February 10, 2000, the Department of Commerce issued countervailing duty orders on imports of CTL carbon steel plate from India, Indonesia, Italy, and Korea (65 FR 6587) and antidumping duty orders on imports of CTL carbon steel plate from France, India, Indonesia, Italy, Japan, and Korea (65 FR 6585). The Commission is conducting reviews to determine whether revocation of the orders would be likely to lead to continuation or recurrence of material injury to the domestic industry within a reasonably foreseeable time. It will assess the adequacy of interested party responses to this notice of institution to determine whether to conduct full reviews or expedited reviews. The Commission's determinations in any expedited reviews will be based on the facts available, which may include information provided in response to this notice.

Definitions. The following definitions apply to these reviews:

(1) Subject Merchandise is the class or kind of merchandise that is within the scope of the five-year reviews, as defined by the Department of Commerce.

(2) The Subject Countries in these reviews are France, India, Indonesia, Italy, Japan, and Korea.

(3) The Domestic Like Product is the domestically produced product or products which are like, or in the absence of like, most similar in characteristics and uses with, the *Subject Merchandise.* In its original determinations, the Commission defined the *Domestic Like Product* as all domestically produced CTL steel plate that corresponds to Commerce's scope description, including grade X–70 plate, micro-alloy steel plate, and plate cut from coils.

(4) The *Domestic Industry* is the U.S. producers as a whole of the *Domestic Like Product,* or those producers whose collective output of the *Domestic Like Product* constitutes a major proportion of the total domestic production of the product. In its original determinations, the Commission defined the *Domestic Industry* as all producers of CTL steel plate, whether toll producers, integrated producers, or processors.

(5) The *Order Date* is the date that the countervailing duty and antidumping duty orders under review became effective. In these reviews, the *Order Date* is February 10, 2000.

(6) An *Importer* is any person or firm engaged, either directly or through a parent company or subsidiary, in importing the *Subject Merchandise* into the United States from a foreign manufacturer or through its selling agent.

Participation in the reviews and public service list. Persons, including industrial users of the *Subject Merchandise* and, if the merchandise is sold at the retail level, representative consumer organizations, wishing to participate in the reviews as parties must file an entry of appearance with the Secretary to the Commission, as provided in section 201.11(b)(4) of the Commission's rules, no later than 21 days after publication of this notice in the **Federal Register**. The Secretary will maintain a public service list containing the names and addresses of all persons, or their representatives, who are parties to the reviews.

Former Commission employees who are seeking to appear in Commission five-year reviews are reminded that they are required, pursuant to 19 CFR 201.15, to seek Commission approval if the matter in which they are seeking to appear was pending in any manner or form during their Commission employment. The Commission's designated agency ethics official has advised that a five-year review is the ''same particular matter'' as the underlying original investigation for purposes of 19 CFR 201.15 and 18 U.S.C. 207, the post employment statute for Federal employees. Former employees may seek informal advice from Commission ethics officials with respect to this and the related issue of whether the employee's participation was ''personal and substantial.'' However, any informal consultation will not relieve former employees of the obligation to seek approval to appear from the Commission under its rule 201.15. For ethics advice, contact Carol McCue Verratti, Deputy Agency Ethics Official, at 202–205–3088.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and APO service list. Pursuant to section 207.7(a) of the Commission's rules, the Secretary will make BPI submitted in these reviews available to authorized applicants under the APO issued in the reviews, provided that the application is made no later than 21 days after publication of this notice in the **Federal Register**. Authorized applicants must represent interested parties, as defined in 19 U.S.C. § 1677(9), who are parties to the reviews. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Certification. Pursuant to section 207.3 of the Commission's rules, any person submitting information to the Commission in connection with these reviews must certify that the information is accurate and complete to the best of the submitter's knowledge. In making the certification, the submitter will be deemed to consent, unless otherwise specified, for the Commission, its employees, and contract personnel to use the information provided in any other reviews or investigations of the same or comparable products which the Commission conducts under Title VII of the Act, or in internal audits and investigations relating to the programs and operations of the Commission pursuant to 5 U.S.C. Appendix 3.

Written submissions. Pursuant to section 207.61 of the Commission's rules, each interested party response to this notice must provide the information specified below. The deadline for filing such responses is February 22, 2005. Pursuant to section 207.62(b) of the Commission's rules, eligible parties (as specified in Commission rule 207.62(b)(1)) may also file comments concerning the adequacy of responses to the notice of institution and whether the Commission should conduct expedited or full reviews. The deadline for filing such comments is March 18, 2005. All written submissions must conform with the provisions of sections 201.8 and 207.3 of the Commission's rules and any submissions that contain BPI must also conform with the requirements of sections 201.6 and 207.7 of the Commission's rules. The Commission's rules do not authorize filing of submissions with the Secretary by facsimile or electronic means, except to the extent permitted by section 201.8 of the Commission's rules, as amended, 67 FR 68036 (November 8, 2002). Also, in accordance with sections 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the reviews must be served on all other parties to the reviews (as identified by either the public or APO service list as appropriate), and a certificate of service must accompany the document (if you are not a party to the reviews you do not need to serve your response).

Inability to provide requested information. Pursuant to section 207.61(c) of the Commission's rules, any interested party that cannot furnish the information requested by this notice in the requested form and manner shall notify the Commission at the earliest possible time, provide a full explanation of why it cannot provide the requested information, and indicate alternative forms in which it can provide equivalent information. If an interested party does not provide this notification (or the Commission finds the explanation provided in the notification inadequate) and fails to provide a complete response to this notice, the Commission may take an adverse inference against the party pursuant to section 776(b) of the Act in making its determinations in the reviews.

Information To Be Provided in Response to This Notice of Institution: If you are a domestic producer, union/worker group, or trade/business association; import/export *Subject Merchandise* from more than one *Subject Country;* or produce *Subject Merchandise* in more than one *Subject Country,* you may file a single response. If you do so, please ensure that your response to each question includes the information requested for each pertinent *Subject Country.* As used below, the term ''firm'' includes any related firms.

(1) The name and address of your firm or entity (including World Wide Web address if available) and name, telephone number, fax number, and E-mail address of the certifying official.

(2) A statement indicating whether your firm/entity is a U.S. producer of the *Domestic Like Product,* a U.S. union or worker group, a U.S. importer of the *Subject Merchandise,* a foreign producer or exporter of the *Subject Merchandise,* a U.S. or foreign trade or business association, or another interested party (including an explanation). If you are a union/worker group or trade/business association, identify the firms in which your workers are employed or which are members of your association.

(3) A statement indicating whether your firm/entity is willing to participate in these reviews by providing information requested by the Commission.

(4) A statement of the likely effects of the revocation of the countervailing duty and antidumping duty orders on the *Domestic Industry* in general and/or your firm/entity specifically. In your response, please discuss the various factors specified in section 752(a) of the Act (19 U.S.C. 1675a(a)) including the likely volume of subject imports, likely price effects of subject imports, and likely impact of imports of *Subject Merchandise* on the *Domestic Industry.*

(5) A list of all known and currently operating U.S. producers of the *Domestic Like Product.* Identify any known related parties and the nature of the relationship as defined in section 771(4)(B) of the Act (19 U.S.C. 1677(4)(B)).

(6) A list of all known and currently operating U.S. importers of the *Subject Merchandise* and producers of the *Subject Merchandise* in each *Subject Country* that currently export or have exported *Subject Merchandise* to the United States or other countries since the *Order Date.*

(7) If you are a U.S. producer of the *Domestic Like Product,* provide the following information on your firm's operations on that product during calendar year 2004 (report quantity data in short tons and value data in U.S. dollars, f.o.b. plant). If you are a union/worker group or trade/business association, provide the information, on an aggregate basis, for the firms in which your workers are employed/which are members of your association.

(a) Production (quantity) and, if known, an estimate of the percentage of total U.S. production of the *Domestic Like Product* accounted for by your firm's(s') production;

(b) the quantity and value of U.S. commercial shipments of the *Domestic Like Product* produced in your U.S. plant(s); and

(c) the quantity and value of U.S. internal consumption/company transfers of the *Domestic Like Product* produced in your U.S. plant(s).

(8) If you are a U.S. importer or a trade/business association of U.S. importers of the *Subject Merchandise* from the *Subject Country(ies),* provide the following information on your firm's(s') operations on that product during calendar year 2004 (report quantity data in short tons and value data in U.S. dollars). If you are a trade/business association, provide the information, on an aggregate basis, for the firms which are members of your association.

(a) The quantity and value (landed, duty-paid but not including antidumping or countervailing duties) of U.S. imports and, if known, an estimate of the percentage of total U.S. imports of *Subject Merchandise* from each *Subject Country* accounted for by your firm's(s') imports;

(b) the quantity and value (f.o.b. U.S. port, including antidumping and/or countervailing duties) of U.S. commercial shipments of *Subject Merchandise* imported from each *Subject Country;* and

(c) the quantity and value (f.o.b. U.S. port, including antidumping and/or countervailing duties) of U.S. internal consumption/company transfers of *Subject Merchandise* imported from each *Subject Country.*

(9) If you are a producer, an exporter, or a trade/business association of producers or exporters of the *Subject Merchandise* in the *Subject Country(ies),* provide the following information on your firm's(s') operations on that product during calendar year 2004 (report quantity data in short tons and value data in U.S. dollars, landed and duty-paid at the U.S. port but not including antidumping or countervailing duties). If you are a trade/business association, provide the information, on an aggregate basis, for the firms which are members of your association.

(a) Production (quantity) and, if known, an estimate of the percentage of total production of *Subject Merchandise* in each *Subject Country* accounted for by your firm's(s') production; and

(b) the quantity and value of your firm's(s') exports to the United States of *Subject Merchandise* and, if known, an estimate of the percentage of total exports to the United States of *Subject Merchandise* from each *Subject Country* accounted for by your firm's(s') exports.

(10) Identify significant changes, if any, in the supply and demand conditions or business cycle for the *Domestic Like Product* that have occurred in the United States or in the market for the *Subject Merchandise* in the *Subject Country(ies)* since the *Order Date*, and significant changes, if any, that are likely to occur within a reasonably foreseeable time. Supply conditions to consider include technology; production methods; development efforts; ability to increase production (including the shift of production facilities used for other products and the use, cost, or availability of major inputs into production); and factors related to the ability to shift supply among different national markets (including barriers to importation in foreign markets or changes in market demand abroad). Demand conditions to consider include end uses and applications; the existence and availability of substitute products; and the level of competition among the *Domestic Like Product* produced in the United States, *Subject Merchandise* produced in each *Subject Country*, and such merchandise from other countries.

(11) (Optional) A statement of whether you agree with the above definitions of the *Domestic Like Product* and *Domestic Industry*; if you disagree with either or both of these definitions,

please explain why and provide alternative definitions.

Authority: These reviews are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.61 of the Commission's rules.

Issued: December 20, 2004.

By order of the Commission.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 04–28727 Filed 12–30–04; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigations Nos. 731–TA–279 and 347 (Second Review)]

Malleable Cast Iron Pipe Fittings From Japan and Korea

AGENCY: International Trade Commission.

ACTION: Institution of five-year reviews concerning the antidumping duty orders on malleable cast iron pipe fittings from Japan and Korea.

SUMMARY: The Commission hereby gives notice that it has instituted reviews pursuant to section 751(c) of the Tariff Act of 1930 (19 U.S.C. 1675(c)) (the Act) to determine whether revocation of the antidumping duty orders on malleable cast iron pipe fittings from Japan and Korea would be likely to lead to continuation or recurrence of material injury. Pursuant to section 751(c)(2) of the Act, interested parties are requested to respond to this notice by submitting the information specified below to the Commission; [1] to be assured of consideration, the deadline for responses is February 22, 2005. Comments on the adequacy of responses may be filed with the Commission by March 18, 2005. For further information concerning the conduct of these reviews and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A, D, E, and F (19 CFR part 207).

EFFECTIVE DATE: January 3, 2005.

FOR FURTHER INFORMATION CONTACT: Mary Messer (202–205–3193), Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for these reviews may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov*.

SUPPLEMENTARY INFORMATION:

Background. On May 23, 1986, the Department of Commerce issued an antidumping duty order on imports of malleable cast iron pipe fittings from Korea (51 FR 18917). On July 6, 1987, the Department of Commerce issued an antidumping duty order on imports of malleable cast iron pipe fittings from Japan (52 FR 25281). Following five-year reviews by Commerce and the Commission, effective February 28, 2000, Commerce issued a continuation of the antidumping duty orders on imports of malleable cast iron pipe fittings from Japan and Korea (65 FR 10469). The Commission is now conducting second reviews to determine whether revocation of the orders would be likely to lead to continuation or recurrence of material injury to the domestic industry within a reasonably foreseeable time. It will assess the adequacy of interested party responses to this notice of institution to determine whether to conduct full reviews or expedited reviews. The Commission's determinations in any expedited reviews will be based on the facts available, which may include information provided in response to this notice.

Definitions. The following definitions apply to these reviews:

(1) Subject Merchandise is the class or kind of merchandise that is within the scope of the five-year reviews, as defined by the Department of Commerce.

(2) The Subject Countries in these reviews are Japan and Korea.

(3) The Domestic Like Product is the domestically produced product or products which are like, or in the absence of like, most similar in characteristics and uses with, the *Subject Merchandise*. In its original determinations and full five-year review determinations, the Commission defined the *Domestic Like Product* as malleable cast iron pipe fittings other than grooved.

(4) The *Domestic Industry* is the U.S. producers as a whole of the *Domestic Like Product*, or those producers whose collective output of the *Domestic Like Product* constitutes a major proportion of the total domestic production of the product. In its original determinations and full five-year review determinations, the Commission defined the *Domestic Industry* as all producers of malleable cast iron pipe fittings other than grooved.

(5) An *Importer* is any person or firm engaged, either directly or through a parent company or subsidiary, in importing the *Subject Merchandise* into the United States from a foreign manufacturer or through its selling agent.

Participation in the reviews and public service list. Persons, including industrial users of the *Subject Merchandise* and, if the merchandise is sold at the retail level, representative consumer organizations, wishing to participate in the reviews as parties must file an entry of appearance with the Secretary to the Commission, as provided in section 201.11(b)(4) of the Commission's rules, no later than 21 days after publication of this notice in the **Federal Register**. The Secretary will maintain a public service list containing the names and addresses of all persons, or their representatives, who are parties to the reviews.

Former Commission employees who are seeking to appear in Commission five-year reviews are reminded that they are required, pursuant to 19 CFR 201.15, to seek Commission approval if the matter in which they are seeking to appear was pending in any manner or form during their Commission employment. The Commission is seeking guidance as to whether a second transition five-year review is the ''same particular matter'' as the underlying original investigation for purposes of 19 CFR 201.15 and 18 U.S.C. 207, the post employment statute for Federal employees. Former employees may seek informal advice from Commission ethics officials with respect to this and the related issue of whether the employee's participation was ''personal and substantial.'' However, any informal consultation will not relieve former employees of the obligation to seek approval to appear from the Commission under its rule 201.15. For ethics advice, contact Carol McCue Verratti, Deputy Agency Ethics Official, at 202–205–3088.

[1] No response to this request for information is required if a currently valid Office of Management and Budget (OMB) number is not displayed; the OMB number is 3117–0016/USITC No. 05–5–107, expiration date June 30, 2005. Public reporting burden for the request is estimated to average 7 hours per response. Please send comments regarding the accuracy of this burden estimate to the Office of Investigations, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and APO service list. Pursuant to section 207.7(a) of the Commission's rules, the Secretary will make BPI submitted in these reviews available to authorized applicants under the APO issued in the reviews, provided that the application is made no later than 21 days after publication of this notice in the **Federal Register**. Authorized applicants must represent interested parties, as defined in 19 U.S.C. 1677(9), who are parties to the reviews. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Certification. Pursuant to section 207.3 of the Commission's rules, any person submitting information to the Commission in connection with these reviews must certify that the information is accurate and complete to the best of the submitter's knowledge. In making the certification, the submitter will be deemed to consent, unless otherwise specified, for the Commission, its employees, and contract personnel to use the information provided in any other reviews or investigations of the same or comparable products which the Commission conducts under Title VII of the Act, or in internal audits and investigations relating to the programs and operations of the Commission pursuant to 5 U.S.C. Appendix 3.

Written submissions. Pursuant to section 207.61 of the Commission's rules, each interested party response to this notice must provide the information specified below. The deadline for filing such responses is February 22, 2005. Pursuant to section 207.62(b) of the Commission's rules, eligible parties (as specified in Commission rule 207.62(b)(1)) may also file comments concerning the adequacy of responses to the notice of institution and whether the Commission should conduct expedited or full reviews. The deadline for filing such comments is March 18, 2005. All written submissions must conform with the provisions of sections 201.8 and 207.3 of the Commission's rules and any submissions that contain BPI must also conform with the requirements of sections 201.6 and 207.7 of the Commission's rules. The Commission's rules do not authorize filing of submissions with the Secretary by facsimile or electronic means, except to the extent permitted by section 201.8 of the Commission's rules, as amended, 67 FR 68036 (November 8, 2002). Also, in accordance with sections 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the reviews must be served on all other parties to the reviews (as identified by either the public or APO service list as appropriate), and a certificate of service must accompany the document (if you are not a party to the reviews you do not need to serve your response).

Inability to provide requested information. Pursuant to section 207.61(c) of the Commission's rules, any interested party that cannot furnish the information requested by this notice in the requested form and manner shall notify the Commission at the earliest possible time, provide a full explanation of why it cannot provide the requested information, and indicate alternative forms in which it can provide equivalent information. If an interested party does not provide this notification (or the Commission finds the explanation provided in the notification inadequate) and fails to provide a complete response to this notice, the Commission may take an adverse inference against the party pursuant to section 776(b) of the Act in making its determinations in the reviews.

Information To Be Provided in Response to This Notice of Institution: If you are a domestic producer, union/worker group, or trade/business association; import/export *Subject Merchandise* from more than one *Subject Country*; or produce *Subject Merchandise* in more than one *Subject Country,* you may file a single response. If you do so, please ensure that your response to each question includes the information requested for each pertinent *Subject Country*. As used below, the term ''firm'' includes any related firms.

(1) The name and address of your firm or entity (including World Wide Web address if available) and name, telephone number, fax number, and E-mail address of the certifying official.

(2) A statement indicating whether your firm/entity is a U.S. producer of the *Domestic Like Product*, a U.S. union or worker group, a U.S. importer of the *Subject Merchandise*, a foreign producer or exporter of the *Subject Merchandise*, a U.S. or foreign trade or business association, or another interested party (including an explanation). If you are a union/worker group or trade/business association, identify the firms in which your workers are employed or which are members of your association.

(3) A statement indicating whether your firm/entity is willing to participate in these reviews by providing information requested by the Commission.

(4) A statement of the likely effects of the revocation of the antidumping duty orders on the *Domestic Industry* in general and/or your firm/entity specifically. In your response, please discuss the various factors specified in section 752(a) of the Act (19 U.S.C. 1675a(a)) including the likely volume of subject imports, likely price effects of subject imports, and likely impact of imports of *Subject Merchandise* on the *Domestic Industry*.

(5) A list of all known and currently operating U.S. producers of the *Domestic Like Product*. Identify any known related parties and the nature of the relationship as defined in section 771(4)(B) of the Act (19 U.S.C. 1677(4)(B)).

(6) A list of all known and currently operating U.S. importers of the *Subject Merchandise* and producers of the *Subject Merchandise* in each *Subject Country* that currently export or have exported *Subject Merchandise* to the United States or other countries after 1998.

(7) If you are a U.S. producer of the *Domestic Like Product*, provide the following information on your firm's operations on that product during calendar year 2004 (report quantity data in short tons and value data in U.S. dollars, f.o.b. plant). If you are a union/worker group or trade/business association, provide the information, on an aggregate basis, for the firms in which your workers are employed/which are members of your association.

(a) Production (quantity) and, if known, an estimate of the percentage of total U.S. production of the *Domestic Like Product* accounted for by your firm's(s') production;

(b) the quantity and value of U.S. commercial shipments of the *Domestic Like Product* produced in your U.S. plant(s); and

(c) the quantity and value of U.S. internal consumption/company transfers of the *Domestic Like Product* produced in your U.S. plant(s).

(8) If you are a U.S. importer or a trade/business association of U.S. importers of the *Subject Merchandise* from the *Subject Country(ies),* provide the following information on your firm's(s') operations on that product during calendar year 2004 (report quantity data in short tons and value data in U.S. dollars). If you are a trade/business association, provide the information, on an aggregate basis, for the firms which are members of your association.

(a) The quantity and value (landed, duty-paid but not including antidumping duties) of U.S. imports and, if known, an estimate of the percentage of total U.S. imports of *Subject Merchandise* from each *Subject*

Country accounted for by your firm's(s') imports;

(b) the quantity and value (f.o.b. U.S. port, including antidumping duties) of U.S. commercial shipments of *Subject Merchandise* imported from each *Subject Country;* and

(c) the quantity and value (f.o.b. U.S. port, including antidumping duties) of U.S. internal consumption/company transfers of *Subject Merchandise* imported from each *Subject Country.*

(9) If you are a producer, an exporter, or a trade/business association of producers or exporters of the *Subject Merchandise* in the *Subject Country(ies),* provide the following information on your firm's(s') operations on that product during calendar year 2004 (report quantity data in short tons and value data in U.S. dollars, landed and duty-paid at the U.S. port but not including antidumping duties). If you are a trade/business association, provide the information, on an aggregate basis, for the firms which are members of your association.

(a) Production (quantity) and, if known, an estimate of the percentage of total production of *Subject Merchandise* in each *Subject Country* accounted for by your firm's(s') production; and

(b) the quantity and value of your firm's(s') exports to the United States of *Subject Merchandise* and, if known, an estimate of the percentage of total exports to the United States of *Subject Merchandise* from each *Subject Country* accounted for by your firm's(s') exports.

(10) Identify significant changes, if any, in the supply and demand conditions or business cycle for the *Domestic Like Product* that have occurred in the United States or in the market for the *Subject Merchandise* in each *Subject Country* after 1998, and significant changes, if any, that are likely to occur within a reasonably foreseeable time. Supply conditions to consider include technology; production methods; development efforts; ability to increase production (including the shift of production facilities used for other products and the use, cost, or availability of major inputs into production); and factors related to the ability to shift supply among different national markets (including barriers to importation in foreign markets or changes in market demand abroad). Demand conditions to consider include end uses and applications; the existence and availability of substitute products; and the level of competition among the *Domestic Like Product* produced in the United States, *Subject Merchandise* produced in each *Subject Country,* and such merchandise from other countries.

(11) (Optional) A statement of whether you agree with the above definitions of the *Domestic Like Product* and *Domestic Industry;* if you disagree with either or both of these definitions, please explain why and provide alternative definitions.

Authority: These reviews are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.61 of the Commission's rules.

Issued: December 20, 2004.

By order of the Commission.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 04–28726 Filed 12–30–04; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigations Nos. 701–TA–297 and 731–TA–422 (Second Review)]

Steel Rails From Canada

AGENCY: International Trade Commission.

ACTION: Institution of five-year reviews concerning the countervailing duty and antidumping duty orders on steel rails from Canada.

SUMMARY: The Commission hereby gives notice that it has instituted reviews pursuant to section 751(c) of the Tariff Act of 1930 (19 U.S.C. 1675(c)) (the Act) to determine whether revocation of the countervailing duty and antidumping duty orders on steel rails from Canada would be likely to lead to continuation or recurrence of material injury. Pursuant to section 751(c)(2) of the Act, interested parties are requested to respond to this notice by submitting the information specified below to the Commission; [1] to be assured of consideration, the deadline for responses is February 22, 2005. Comments on the adequacy of responses may be filed with the Commission by March 18, 2005. For further information concerning the conduct of these reviews and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A, D, E, and F (19 CFR part 207).

EFFECTIVE DATES: January 3, 2005.

FOR FURTHER INFORMATION CONTACT: Mary Messer (202–205–3193), Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*http://www.usitc.gov*). The public record for these reviews may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION:

Background. On September 15, 1989, the Department of Commerce issued an antidumping duty order on imports of steel rails from Canada (54 FR 38263). On September 22, 1989, the Department of Commerce issued a countervailing duty order on imports of steel rails from Canada (54 FR 39032). Following five-year reviews by Commerce and the Commission, effective February 9, 2000, Commerce issued a continuation of the countervailing duty and antidumping duty orders on imports of steel rails from Canada (65 FR 6358). The Commission is now conducting second reviews to determine whether revocation of the orders would be likely to lead to continuation or recurrence of material injury to the domestic industry within a reasonably foreseeable time. It will assess the adequacy of interested party responses to this notice of institution to determine whether to conduct full reviews or expedited reviews. The Commission's determinations in any expedited reviews will be based on the facts available, which may include information provided in response to this notice.

Definitions. The following definitions apply to these reviews:

(1) Subject Merchandise is the class or kind of merchandise that is within the scope of the five-year reviews, as defined by the Department of Commerce.

(2) The Subject Country in these reviews is Canada.

(3) The Domestic Like Product is the domestically produced product or products which are like, or in the absence of like, most similar in characteristics and uses with, the

[1] No response to this request for information is required if a currently valid Office of Management and Budget (OMB) number is not displayed; the OMB number is 3117–0016/USITC No. 05–5–108, expiration date June 30, 2005. Public reporting burden for the request is estimated to average 7 hours per response. Please send comments regarding the accuracy of this burden estimate to the Office of Investigations, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436.

Subject Merchandise. In its original determinations and expedited five-year review determinations, the Commission defined the Domestic Like Product as all new steel rails, including both prime and industrial rails but excluding light rails. One Commissioner defined the Domestic Like Product differently in the original determinations.

(4) The Domestic Industry is the U.S. producers as a whole of the Domestic Like Product, or those producers whose collective output of the Domestic Like Product constitutes a major proportion of the total domestic production of the product. In its original determinations and expedited five-year review determinations, the Commission defined the Domestic Industry as all producers of new steel rails, including both prime and industrial rails but excluding light rails. One Commissioner defined the Domestic Industry differently in the original investigations.

(5) An Importer is any person or firm engaged, either directly or through a parent company or subsidiary, in importing the Subject Merchandise into the United States from a foreign manufacturer or through its selling agent.

Participation in the reviews and public service list. Persons, including industrial users of the Subject Merchandise and, if the merchandise is sold at the retail level, representative consumer organizations, wishing to participate in the reviews as parties must file an entry of appearance with the Secretary to the Commission, as provided in section 201.11(b)(4) of the Commission's rules, no later than 21 days after publication of this notice in the **Federal Register**. The Secretary will maintain a public service list containing the names and addresses of all persons, or their representatives, who are parties to the reviews.

Former Commission employees who are seeking to appear in Commission five-year reviews are reminded that they are required, pursuant to 19 CFR 201.15, to seek Commission approval if the matter in which they are seeking to appear was pending in any manner or form during their Commission employment. The Commission is seeking guidance as to whether a second transition five-year review is the ''same particular matter'' as the underlying original investigation for purposes of 19 CFR 201.15 and 18 U.S.C. 207, the post employment statute for Federal employees. Former employees may seek informal advice from Commission ethics officials with respect to this and the related issue of whether the employee's participation was ''personal and substantial.'' However, any informal consultation will not relieve former employees of the obligation to seek approval to appear from the Commission under its rule 201.15. For ethics advice, contact Carol McCue Verratti, Deputy Agency Ethics Official, at 202–205–3088.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and APO service list. Pursuant to section 207.7(a) of the Commission's rules, the Secretary will make BPI submitted in these reviews available to authorized applicants under the APO issued in the reviews, provided that the application is made no later than 21 days after publication of this notice in the **Federal Register**. Authorized applicants must represent interested parties, as defined in 19 U.S.C. 1677(9), who are parties to the reviews. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Certification. Pursuant to section 207.3 of the Commission's rules, any person submitting information to the Commission in connection with these reviews must certify that the information is accurate and complete to the best of the submitter's knowledge. In making the certification, the submitter will be deemed to consent, unless otherwise specified, for the Commission, its employees, and contract personnel to use the information provided in any other reviews or investigations of the same or comparable products which the Commission conducts under Title VII of the Act, or in internal audits and investigations relating to the programs and operations of the Commission pursuant to 5 U.S.C. Appendix 3.

Written submissions. Pursuant to section 207.61 of the Commission's rules, each interested party response to this notice must provide the information specified below. The deadline for filing such responses is February 22, 2005. Pursuant to section 207.62(b) of the Commission's rules, eligible parties (as specified in Commission rule 207.62(b)(1)) may also file comments concerning the adequacy of responses to the notice of institution and whether the Commission should conduct expedited or full reviews. The deadline for filing such comments is March 18, 2005. All written submissions must conform with the provisions of sections 201.8 and 207.3 of the Commission's rules and any submissions that contain BPI must also conform with the requirements of sections 201.6 and 207.7 of the Commission's rules. The Commission's rules do not authorize filing of submissions with the Secretary by facsimile or electronic means, except to the extent permitted by section 201.8 of the Commission's rules, as amended, 67 FR 68036 (November 8, 2002). Also, in accordance with sections 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the reviews must be served on all other parties to the reviews (as identified by either the public or APO service list as appropriate), and a certificate of service must accompany the document (if you are not a party to the reviews you do not need to serve your response).

Inability to provide requested information. Pursuant to section 207.61(c) of the Commission's rules, any interested party that cannot furnish the information requested by this notice in the requested form and manner shall notify the Commission at the earliest possible time, provide a full explanation of why it cannot provide the requested information, and indicate alternative forms in which it can provide equivalent information. If an interested party does not provide this notification (or the Commission finds the explanation provided in the notification inadequate) and fails to provide a complete response to this notice, the Commission may take an adverse inference against the party pursuant to section 776(b) of the Act in making its determinations in the reviews.

Information To Be Provided in Response To This Notice of Institution: As used below, the term ''firm'' includes any related firms.

(1) The name and address of your firm or entity (including World Wide Web address if available) and name, telephone number, fax number, and E-mail address of the certifying official.

(2) A statement indicating whether your firm/entity is a U.S. producer of the Domestic Like Product, a U.S. union or worker group, a U.S. importer of the Subject Merchandise, a foreign producer or exporter of the Subject Merchandise, a U.S. or foreign trade or business association, or another interested party (including an explanation). If you are a union/worker group or trade/business association, identify the firms in which your workers are employed or which are members of your association.

(3) A statement indicating whether your firm/entity is willing to participate in these reviews by providing information requested by the Commission.

(4) A statement of the likely effects of the revocation of the countervailing duty and antidumping duty orders on the Domestic Industry in general and/or your firm/entity specifically. In your response, please discuss the various

factors specified in section 752(a) of the Act (19 U.S.C. 1675a(a)) including the likely volume of subject imports, likely price effects of subject imports, and likely impact of imports of Subject Merchandise on the Domestic Industry.

(5) A list of all known and currently operating U.S. producers of the Domestic Like Product. Identify any known related parties and the nature of the relationship as defined in section 771(4)(B) of the Act (19 U.S.C. 1677(4)(B)).

(6) A list of all known and currently operating U.S. importers of the Subject Merchandise and producers of the Subject Merchandise in the Subject Country that currently export or have exported Subject Merchandise to the United States or other countries after 1998.

(7) If you are a U.S. producer of the Domestic Like Product, provide the following information on your firm's operations on that product during calendar year 2004 (report quantity data in short tons and value data in U.S. dollars, f.o.b. plant). If you are a union/worker group or trade/business association, provide the information, on an aggregate basis, for the firms in which your workers are employed/which are members of your association.

(a) Production (quantity) and, if known, an estimate of the percentage of total U.S. production of the Domestic Like Product accounted for by your firm's(s') production;

(b) the quantity and value of U.S. commercial shipments of the Domestic Like Product produced in your U.S. plant(s); and

(c) the quantity and value of U.S. internal consumption/company transfers of the Domestic Like Product produced in your U.S. plant(s).

(8) If you are a U.S. importer or a trade/business association of U.S. importers of the Subject Merchandise from the Subject Country, provide the following information on your firm's(s') operations on that product during calendar year 2004 (report quantity data in short tons and value data in U.S. dollars). If you are a trade/business association, provide the information, on an aggregate basis, for the firms which are members of your association.

(a) The quantity and value (landed, duty-paid but not including antidumping or countervailing duties) of U.S. imports and, if known, an estimate of the percentage of total U.S. imports of Subject Merchandise from the Subject Country accounted for by your firm's(s') imports;

(b) the quantity and value (f.o.b. U.S. port, including antidumping and/or countervailing duties) of U.S. commercial shipments of Subject Merchandise imported from the Subject Country; and

(c) the quantity and value (f.o.b. U.S. port, including antidumping and/or countervailing duties) of U.S. internal consumption/company transfers of Subject Merchandise imported from the Subject Country.

(9) If you are a producer, an exporter, or a trade/business association of producers or exporters of the Subject Merchandise in the Subject Country, provide the following information on your firm's(s') operations on that product during calendar year 2004 (report quantity data in short tons and value data in U.S. dollars, landed and duty-paid at the U.S. port but not including antidumping or countervailing duties). If you are a trade/business association, provide the information, on an aggregate basis, for the firms which are members of your association.

(a) Production (quantity) and, if known, an estimate of the percentage of total production of Subject Merchandise in the Subject Country accounted for by your firm's(s') production; and

(b) the quantity and value of your firm's(s') exports to the United States of Subject Merchandise and, if known, an estimate of the percentage of total exports to the United States of Subject Merchandise from the Subject Country accounted for by your firm's(s') exports.

(10) Identify significant changes, if any, in the supply and demand conditions or business cycle for the Domestic Like Product that have occurred in the United States or in the market for the Subject Merchandise in the Subject Country after 1998, and significant changes, if any, that are likely to occur within a reasonably foreseeable time. Supply conditions to consider include technology; production methods; development efforts; ability to increase production (including the shift of production facilities used for other products and the use, cost, or availability of major inputs into production); and factors related to the ability to shift supply among different national markets (including barriers to importation in foreign markets or changes in market demand abroad). Demand conditions to consider include end uses and applications; the existence and availability of substitute products; and the level of competition among the Domestic Like Product produced in the United States, Subject Merchandise produced in the Subject Country, and such merchandise from other countries.

(11) (Optional) A statement of whether you agree with the above definitions of the Domestic Like Product and Domestic Industry; if you disagree with either or both of these definitions, please explain why and provide alternative definitions.

Authority: These reviews are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.61 of the Commission's rules.

Issued: December 20, 2004.

By order of the Commission.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 04–28725 Filed 12–30–04; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Office of Community Oriented Policing Services; Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 30-day notice of information collection under review: COPS application attachment to SF–424.

The Department of Justice (DOJ), Office of Community Oriented Policing Services (COPS) has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** Volume 69, Number 206, page 62455 on October 26, 2004, allowing for a 60 day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until February 2, 2005. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20503. Additionally, comments may be submitted to OMB via facsimile to (202) 395–5806. Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
—Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
—Enhance the quality, utility, and clarity of the information to be collected; and
—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* New collection.

(2) *Title of the Form/Collection:* COPS Application Attachment to SF–424.

(3) *Agency form number, if any, and the applicable component of the Department sponsoring the collection:* None. U.S. Department of Justice, Office of Community Oriented Policing Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Law enforcement agencies and other public and private entities that apply for COPS Office grants or cooperative agreements will be asked to complete the COPS Application Attachment to SF–424. The COPS Application Attachment to SF–424 is the result of a COPS Office business process reengineering effort aimed at standardization as required under the grant streamlining requirements of Public Law 106–107, the Federal Financial Assistance Management Improvement Act of 1999, as well as the President's Management Agenda E-grants Initiative. Currently, the COPS Office uses multiple application forms that are not standardized across programs. This new form streamlines application forms across all COPS Office programs and should reduce the burden on applicants due their ability to use the same form for multiple programs, thus reducing the need for applicant's to learn how to complete multiple forms.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply:* It is estimated that 6,200 respondents annually will complete the form within 8 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* There are an estimated 49,600 total annual burden hours associated with this collection.

If additional information is required contact: Brenda E. Dyer, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Patrick Henry Building, Suite 1600, 601 D Street, NW., Washington, DC 20530.

Dated: December 27, 2004.

Brenda E. Dyer,

Department Clearance Officer, Department of Justice.

[FR Doc. 04–28636 Filed 12–30–04; 8:45 am]

BILLING CODE 4410–AT–P

DEPARTMENT OF JUSTICE

Office of Community Oriented Policing Services; Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 30-day notice of information collection under review: COPS application guide: targeted/invited programs.

The Department of Justice (DOJ), Office of Community Oriented Policing Services (COPS) has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** Volume 69, Number 206, page 62456 on October 26, 2004, allowing for a 60 day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until February 2, 2005. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20503. Additionally, comments may be submitted to OMB via facsimile to (202) 395–5806. Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
—Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
—Enhance the quality, utility, and clarity of the information to be collected; and
—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* New collection.

(2) *Title of the Form/Collection:* COPS Application Guided: Targeted/Invited Programs.

(3) *Agency form number, if any, and the applicable component of the Department sponsoring the collection:* None. U.S. Department of Justice, Office of Community Oriented Policing Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Law enforcement agencies and other public and private entities that apply for COPS Office grants or cooperative agreements will be asked to review the COPS Application Guide: Open/Competitive Programs. The COPS Application Guide: Targeted/Invited Programs is the result of a COPS Office business process reengineering effort aimed at standardization as required under the grant streamlining requirements of Public Law 106–107, the Federal Financial Assistance Management Improvement Act of 1999, as well as the President's Management Agenda E-grants Initiative. This new Guide streamlines instructional booklets across all COPS Office targeted/invited programs and should reduce the burden on applicants due their ability to use the same Guide to gather information on multiple COPS Office programs, thus reducing the need for applicant to review multiple instructions.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply:* It is estimated that 1,000 respondents annually will complete the form within one hour.

(6) *An estimate of the total public burden (in hours) associated with the collection:* There are an estimated 1,000 total annual burden hours associated with this collection.

FOR FURTHER INFORMATION CONTACT: Brenda E. Dyer, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Patrick Henry Building, Suite 1600, 601 D Street, NW., Washington, DC 20530.

Dated: December 27, 2004.

Brenda E. Dyer,

Department Clearance Officer, Department of Justice.

[FR Doc. 04–28637 Filed 12–30–04; 8:45 am]

BILLING CODE 4410–AT–P

DEPARTMENT OF JUSTICE

Office of Community Oriented Policing Services; Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 30-day notice of information collection under review: COPS application guide: Open/competitive programs.

The Department of Justice (DOJ), Office of Community Oriented Policing Services (COPS) has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** Volume 69, Number 206, page 62457 on October 26, 2004, allowing for a 60-day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until February 2, 2005. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20503. Additionally, comments may be submitted to OMB via facsimile to (202) 395–5806. Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* New collection.

(2) *Title of the Form/Collection:* COPS Application Guide: Open/Competitive Programs.

(3) *Agency form number, if any, and the applicable component of the Department sponsoring the collection:* None. U.S. Department of Justice, Office of Community Oriented Policing Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Law enforcement agencies and other public and private entities that apply for COPS Office grants or cooperative agreements will be asked to review the COPS Application Guide: Open/Competitive Programs. The COPS Application Guide: Open/Competitive Programs is the result of a COPS Office business process reengineering effort aimed at standardization as required under the grant streamlining requirements of Public Law 106–107, the Federal Financial Assistance Management Improvement Act of 1999, as well as the President's Management Agenda E-grants Initiative. This new Guide streamlines instructional booklets across all COPS Office open/competitive programs and should reduce the burden on applicants due to their ability to use the same Guide to gather information on multiple COPS Office programs, thus reducing the need for the applicant to review multiple instructions.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply:* It is estimated that 5,200 respondents annually will complete the form within 1 hour.

(6) *An estimate of the total public burden (in hours) associated with the collection:* There are an estimated 5,200 annual burden hours associated with this collection.

If additional information is required contact: Brenda E. Dyer, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Patrick Henry Building, Suite 1600, 601 D Street NW., Washington, DC 20530.

Dated: December 27, 2004.

Brenda E. Dyer,

Department Clearance Officer, Department of Justice.

[FR Doc. 04–28639 Filed 12–30–04; 8:45 am]

BILLING CODE 4410–AT–P

DEPARTMENT OF JUSTICE

Office of Community Oriented Policing Services; Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 30-day notice of information collection under review: COPS Budget Detail Worksheet.

The Department of Justice (DOJ), Office of Community Oriented Policing Services (COPS) has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** Volume 69, Number 206, page 62456 on October 26, 2004, allowing for a 60-day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until February 2, 2005. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs,

Attention Department of Justice Desk Officer, Washington, DC 20503. Additionally, comments may be submitted to OMB via facsimile to (202) 395–5806. Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* New collection.

(2) *Title of the Form/Collection:* COPS Budget Detail Worksheets.

(3) *Agency form number, if any, and the applicable component of the Department sponsoring the collection:* None. U.S. Department of Justice, Office of Community Oriented Policing Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Law enforcement agencies and other public and private entities that apply for COPS Office grants or cooperative agreements will be asked to complete the COPS Budget Detail Worksheets. The COPS Budget Detail Worksheets are the result of a COPS Office business process reengineering effort aimed at standardization as required under the grant streamlining requirements of Public Law 106–107, the Federal Financial Assistance Management Improvement Act of 1999, as well as the President's Management Agenda E-grants Initiative. The new worksheets standardize the budget forms across all COPS Office programs and should reduce the burden on applicants due their ability to use the same form for multiple programs, thus reducing the need for applicant's to learn how to complete multiple forms.

(5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply: It is estimated that 6,200 respondents annually will complete the form within one and a half hours.

(6) An estimate of the total public burden (in hours) associated with the collection: There is an estimated 9,300 total annual burden hours associated with this collections.

If additional information is required contact: Brenda E. Dyer, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Patrick Henry Building, Suite 1600, 601 D Street NW., Washington, DC 20530.

Dated: December 4, 2004.

Brenda E. Dyer,

Department Clearance Officer, Department of Justice.

[FR Doc. 04–28640 Filed 12–30–04; 8:45 am]

BILLING CODE 4410–AT–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[DEA # 259E]

Controlled Substances: Established Initial Aggregate Production Quotas for 2005

AGENCY: Drug Enforcement Administration (DEA), Justice.

ACTION: Notice of aggregate production quotas for 2005.

SUMMARY: This notice establishes initial 2005 aggregate production quotas for controlled substances in Schedules I and II of the Controlled Substances Act (CSA).

DATES: *Effective Date:* January 3, 2005.

FOR FURTHER INFORMATION CONTACT: Christine A. Sannerud, Ph.D., Chief, Drug & Chemical Evaluation Section, Drug Enforcement Administration, Washington, DC 20537, Telephone: (202) 307–7183.

SUPPLEMENTARY INFORMATION: Section 306 of the CSA (21 U.S.C. 826) requires that the Attorney General establish aggregate production quotas for each basic class of controlled substance listed in Schedules I and II. This responsibility has been delegated to the Administrator of the DEA by Section 0.100 of Title 28 of the Code of Federal Regulations. The Administrator, in turn, has redelegated this function to the Deputy Administrator, pursuant to Section 0.104 of Title 28 of the Code of Federal Regulations.

The 2005 aggregate production quotas represent those quantities of controlled substances that may be produced in the United States in 2005 to provide adequate supplies of each substance for: the estimated medical, scientific, research and industrial needs of the United States; lawful export requirements; and the establishment and maintenance of reserve stocks (21 U.S.C. 826(a) and 21 CFR 1303.11). These quotas do not include imports of controlled substances for use in industrial processes.

On December 3, 2004, a notice of the proposed initial 2005 aggregate production quotas for certain controlled substances in Schedules I and II was published in the **Federal Register** (69 FR 70284). All interested persons were invited to comment on or object to these proposed aggregate production quotas on or before December 27, 2004.

Nine responses were received resulting in comments on a total of fourteen Schedules I and II controlled substances within the published comment period. The responses commented that the proposed aggregate production quotas for alfentanil, amphetamine, codeine, fentanyl, gamma-hydroxybutyric acid (GHB), hydromorphone, levorphanol, methadone, methadone intermediate, methamphetamine (for conversion), methylphenidate, oxymorphone and tetrahydrocannabinols were insufficient to provide for the estimated medical, scientific, research and industrial needs of the United States, for export requirements and for the establishment and maintenance of reserve stocks. One comment stated that the proposed aggregate production quota for 2,5-dimethoxyamphetamine was too high.

DEA has taken into consideration the above comments along with the relevant 2004 manufacturing quotas, current 2004 sales and inventories, 2005 export requirements, and research and product development requirements. Based on this information, the DEA has adjusted the initial aggregate production quotas for hydromorphone, lysergic acid diethylamide, marihuana, methamphetamine (for conversion), and tetrahydrocannabinols to meet the legitimate needs of the United States.

Regarding 2,5-dimehthoxyamphetamine, alfentanil, amphetamine, codeine, fentanyl, gamma-hydroxybutyric acid (GHB), levorphanol, methadone, methadone intermediate, methylphenidate and oxymorphone, the DEA has determined that the proposed initial 2005 aggregate production quotas are sufficient to meet

the current 2005 estimated medical, scientific, research and industrial needs of the United States.

Pursuant to Part 1303 of Title 21 of the Code of Federal Regulations, the Deputy Administrator of the DEA will, in 2005, adjust aggregate production quotas and individual manufacturing quotas allocated for the year based upon 2004 year-end inventory and actual 2004 disposition data supplied by quota recipients for each basic class of Schedule I or II controlled substance.

Therefore, under the authority vested in the Attorney General by Section 306 of the Controlled Substances Act of 1970 (21 U.S.C. 826), and delegated to the Administrator of the DEA by Section 0.100 of Title 28 of the Code of Federal Regulations, and redelegated to the Deputy Administrator pursuant to Section 0.104 of Title 28 of the Code of Federal Regulations, the Deputy Administrator hereby orders that the 2005 initial aggregate production quotas for the following controlled substances, expressed in grams of anhydrous acid or base, be established as follows:

	Established initial 2005 quotas (g)
Basic Class—Schedule I:	
2,5-Dimethoxyamphetamine	2,801,000
2,5-Dimethoxy-4-ethylamphetamine (DOET)	2
2,5-Dimethoxy-4-(n)-propylthiophenethylamine	10
3-Methylfentanyl	2
3-Methylthiofentanyl	2
3,4-Methylenedioxyamphetamine (MDA)	15
3,4-Methylenedioxy-N-ethylamphetamine (MDEA)	5
3,4-Methylenedioxymethamphetamine (MDMA)	15
3,4,5-Trimethoxyamphetamine	2
4-Bromo-2,5-dimethoxyamphetamine (DOB)	2
4-Bromo-2,5-dimethoxyphenethylamine (2-CB)	2
4-Methoxyamphetamine	2
4-Methylaminorex	2
4-Methyl-2,5-dimethoxyamphetamine (DOM)	2
5-Methoxy-3,4-methylenedioxyamphetamine	2
5-Methoxy-N,N-diisopropyltryptamine (5-MeO-DIPT)	10
Acetyl-alpha-methylfentanyl	2
Acetyldihydrocodeine	2
Acetylmethadol	2
Allylprodine	2
Alphacetylmethadol	2
Alpha-ethyltryptamine	2
Alphameprodine	2
Alphamethadol	3
Alpha-methyltryptamine (AMT)	10
Alpha-methylfentanyl	2
Alpha-methylthiofentanyl	2
Aminorex	2
Benzylmorphine	2
Betacetylmethadol	2
Beta-hydroxy-3-methylfentanyl	2
Beta-hydroxyfentanyl	2
Betameprodine	2
Betamethadol	2
Betaprodine	2
Bufotenine	2
Cathinone	2
Codeine-N-oxide	252
Diethyltryptamine	2
Difenoxin	5,000
Dihydromorphine	1,551,000
Dimethyltryptamine	3
Gamma-hydroxybutyric acid	8,000,000
Heroin	2
Hydromorphinol	2
Hydroxypethidine	2
Lysergic acid diethylamide (LSD)	61
Marihuana	913,020
Mescaline	2
Methaqualone	5
Methcathinone	4
Methyldihydromorphine	2
Morphine-N-oxide	252
N,N-Dimethylamphetamine	2
N-Ethylamphetamine	2
N-Hydroxy-3,4-methylenedioxyamphetamine	2
Noracymethadol	2
Norlevorphanol	52
Normethadone	2
Normorphine	12

	Established initial 2005 quotas (g)
Para-fluorofentanyl	2
Phenomorphan	2
Pholcodine	2
Propiram	50,000
Psilocybin	2
Psilocyn	7
Tetrahydrocannabinols	312,500
Thiofentanyl	2
Trimeperidine	2
Basic Class—Schedule II:	
1-Phenylcyclohexylamine	2
Alfentanil	2,500
Alphaprodine	2
Amobarbital	2
Amphetamine	12,700,000
Cocaine	228,000
Codeine (for sale)	39,605,000
Codeine (for conversion)	55,000,000
Dextropropoxyphene	167,365,000
Dihydrocodeine	748,000
Diphenoxylate	571,000
Ecgonine	53,000
Ethylmorphine	2
Fentanyl	1,428,000
Glutethimide	2
Hydrocodone (for sale)	37,604,000
Hydrocodone (for conversion)	1,500,000
Hydromorphone	2,751,000
Isomethadone	2
Levo-alphacetylmethadol	2
(LAAM) Levomethorphan	2
Levorphanol	5,000
Meperidine	9,753,000
Metazocine	1
Methadone (for sale)	13,900,000
Methadone Intermediate	18,000,000
Methamphetamine	2,932,000
[680,000 grams of levo-desoxyephedrine for use in a non-controlled, non-prescription product; 2,200,000 grams for methamphetamine mostly for conversion to a Schedule III product; and 52,000 grams for methamphetamine (for sale)]	
Methylphenidate	30,817,000
Morphine (for sale)	35,000,000
Morphine (for conversion)	110,774,000
Nabilone	2
Noroxymorphone (for sale)	1,002
Noroxymorphone (for conversion)	4,000,000
Opium	1,180,000
Oxycodone (for sale)	49,200,000
Oxycodone (for conversion)	920,000
Oxymorphone	534,000
Pentobarbital	18,251,000
Phencyclidine	2,006
Phenmetrazine	2
Racemethorphan	2
Secobarbital	2
Sufentanil	4,000
Thebaine	72,453,000

The Deputy Administrator further orders that aggregate production quotas for all other Schedules I and II controlled substances included in Sections 1308.11 and 1308.12 of Title 21 of the Code of Federal Regulations be established at zero.

The Office of Management and Budget has determined that notices of aggregate production quotas are not subject to centralized review under Executive Order 12866.

This action does not preempt or modify any provision of state law; nor does it impose enforcement responsibilities on any state; nor does it diminish the power of any state to enforce its own laws. Accordingly, this action does not have federalism implications warranting the application of Executive Order 13132.

The Deputy Administrator hereby certifies that this action will have no significant impact upon small entities whose interests must be considered under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* The establishment of aggregate production quotas for Schedules I and II controlled substances is mandated by law and by international treaty obligations. The quotas are necessary to provide for the estimated medical, scientific, research and industrial needs of the United States, for export requirements and the establishment and maintenance of

reserve stocks. While aggregate production quotas are of primary importance to large manufacturers, their impact upon small entities is neither negative nor beneficial. Accordingly, the Deputy Administrator has determined that this action does not require a regulatory flexibility analysis.

This action meets the applicable standards set forth in Sections 3(a) and 3(b)(2) of Executive Order 12988 Civil Justice Reform.

This action will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $114,000,000 or more in any one year, and will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

This action is not a major rule as defined by Section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This action will not result in an annual effect on the economy of $100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Dated: December 29, 2004.

Michele M. Leonhart,

Deputy Administrator.

[FR Doc. 04–28746 Filed 12–29–04; 10:58 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Office of Justice Programs

Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 60-day notice of information collection under review: Categorical assistance progress report.

The Department of Justice (DOJ), Office of Justice Programs (OJP), has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for ''sixty days'' until March 4, 2005. This process is conducted in accordance with 5 CFR 1320.10.

If you have comments, especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact: Adolpho Trevino, Office of Justice Programs, 810 7th Street NW., Washington, DC 20531.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of this information collection:

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Categorical Assistance Progress Report.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form Number: OJP FORM 4587/1. Office of Justice Programs.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary. State, Local or Tribal Government. Other: Federal Government, Individuals or households, Not-for-profit institutions. The Uniform Administrative Requirements for grants and Cooperative Agreements—28 CFR, part 66, and OMB Circular A–100—authorizes the Department of Justice to collect information from grantees to report on project activities and accomplishments. Grantees that are recipients of a discretionary grant, as well as some formula grants, are required by OJP to report project activities and accomplishments by submitting Categorical Assistance Progress Reports. These reports are expected to include details regarding the stage of project development and data regarding accomplishments to date.

(5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond: It is estimated that 10, 366 respondents will take approximately two hours to complete each semi-annual submission of the Categorical Assistance Progress Report for a total of four hours annually per grantee.

(6) An estimate of the total public burden (in hours) associated with the collection: There are an estimated 44,164 total annual burden hours associated with this collection.

If additional information is required contact: Brenda E. Dyer, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Patrick Henry Building, Suite 1600, 601 D Street NW., Washington, DC 20530.

Dated: December 27, 2004.

Brenda E. Dyer,

Department Clearance Officer, Department of Justice.

[FR Doc. 04–28638 Filed 12–30–04; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF LABOR

Employment Standards Administration; Wage and Hour Division

Minimum Wages for Federal and Federally Assisted Construction; General Wage Determination Decisions

General wage determination decisions of the Secretary of Labor are issued in accordance with applicable law and are based on the information obtained by the Department of Labor from its study of local wage conditions and data made available from other sources. They specify the basic hourly wage rates and fringe benefits which are determined to be prevailing for the described classes of laborers and mechanics employed on construction projects of a similar character and in the localities specified therein.

The determinations in these decisions of prevailing rates and fringe benefits have been made in accordance with 29 CFR part 1, by authority of the Secretary of Labor pursuant to the provisions of the Davis-Bacon Act of March 3, 1931, as amended (46 Stat. 1494, as amended, 40 U.S.C. 276a) and of other Federal statutes referred to in 29 CFR part 1,

Appendix, as well as such additional statutes as may from time to time be enacted containing provisions for the payment of wages determined to be prevailing by the Secretary of Labor in accordance with the Davis-Bacon Act. The prevailing rates and fringe benefits determined in these decisions shall, in accordance with the provisions of the foregoing statutes, constitute the minimum wages payable on Federal and federally assisted construction projects to laborers and mechanics of the specified classes engaged on contract work of the character and in the localities described therein.

Good cause is hereby found for not utilizing notice and public comment procedure thereon prior to the issuance of these determinations as prescribed in 5 U.S.C. 553 and not providing for delay in the effective date as prescribed in that section, because the necessity to issue current construction industry wage determinations frequently and in large volume causes procedures to be impractical and contrary to the public interest.

General wage determination decisions, and modifications and supersedeas decisions thereto, contain no expiration dates and are effective from their date of notice in the **Federal Register**, or on the date written notice is received by the agency, whichever is earlier. These decisions are to be used in accordance with the provisions of 29 CFR parts 1 and 5. Accordingly, the applicable decision, together with any modifications issued, must be made a part of every contract for performance of the described work within the geographic area indicated as required by an applicable Federal prevailing wage law and 29 CFR part 5. The wage rates and fringe benefits, notice of which is published herein, and which are contained in the Government Printing Office (GPO) document entitled ''General Wage Determinations Issued Under the Davis-Bacon and Related Acts,'' shall be the minimum paid by contractors and subcontractors to laborers and mechanics.

Any person, organization, or governmental agency having an interest in the rates determined as prevailing is encouraged to submit wage rate and fringe benefit information for consideration by the Department. Further information and self-explanatory forms for the purpose of submitting this data may be obtained by writing to the U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, Division of Wage Determinations, 200 Constitution Avenue, NW., Room S–3014, Washington, DC 20210.

Modification to General Wage Determination Decisions

The number of the decisions listed to the Government Printing Office document entitled ''General Wage Determinations Issued Under the Davis-Bacon and Related Acts'' being modified are listed by Volume and State. Dates of publication in the **Federal Register** are in parentheses following the decisions being modified.

Volume I

Maine
ME030001 (Jun. 13, 2003)
ME030002 (Jun. 13, 2003)
ME030006 (Jun. 13, 2003)
ME030008 (Jun. 13, 2003)
New Jersey
NJ030001 (Jun. 13, 2003)

Volume II

None

Volume III

None

Volume IV

None

Volume V

Iowa
IA030002 (Jun. 13, 2003)
IA030003 (Jun. 13, 2003)
IA030004 (Jun. 13, 2003)
IA030005 (Jun. 13, 2003)
IA030006 (Jun. 13, 2003)
IA030008 (Jun. 13, 2003)
IA030012 (Jun. 13, 2003)
IA030014 (Jun. 13, 2003)
IA030016 (Jun. 13, 2003)
IA030017 (Jun. 13, 2003)
IA030019 (Jun. 13, 2003)
IA030031 (Jun. 13, 2003)
IA030038 (Jun. 13, 2003)
IA030040 (Jun. 13, 2003)
IA030054 (Jun. 13, 2003)
IA030060 (Jun. 13, 2003)
Missouri
MO030001 (Jun. 13, 2003)
MO030003 (Jun. 13, 2003)
MO030006 (Jun. 13, 2003)
MO030007 (Jun. 13, 2003)
MO030008 (Jun. 13, 2003)
MO030019 (Jun. 13, 2003)
MO030020 (Jun. 13, 2003)
MO030041 (Jun. 13, 2003)
MO030043 (Jun. 13, 2003)
MO030047 (Jun. 13, 2003)
MO030052 (Jun. 13, 2003)
MO030053 (Jun. 13, 2003)
MO030055 (Jun. 13, 2003)
MO030056 (Jun. 13, 2003)
MO030061 (Jun. 13, 2003)

Volume VI

None

Volume VII

None

General Wage Determination Publication

General wage determinations issued under the Davis-Bacon and related Acts, including those noted above, may be found in the Government Printing Office (GPO) document entitled ''General Wage Determinations Issued Under the Davis-Bacon And Related Acts''. This publication is available at each of the 50 Regional Government Depository Libraries and many of the 1,400 Government Depository Libraries across the country.

General wage determinations issued under the Davis-Bacon and related Acts are available electronically at no cost on the Government Printing Office site at *http://www.access.gpo.gov/davisbacon*. They are also available electronically by subscription to the Davis-Bacon Online Service (*http://davisbacon.fedworld.gov*) of the National Technical Information Service (NTIS) of the U.S. Department of Commerce at 1–800–363–2068. This subscription offers value-added features such as electronic delivery of modified wage decisions directly to the user's desktop, the ability to access prior wage decisions issued during the year, extensive Help desk Support, etc.

Hard-copy subscriptions may be purchased from: Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402. (202) 512–1800.

When ordering hard-copy subscription(s), be sure to specify the State(s) of interest, since subscriptions may be ordered for any or all of the six separate Volumes, arranged by State. Subscriptions include an annual edition (issued in January or February) which includes all current general wage determinations for the States covered by each volume. Throughout the remainder of the year, regular weekly updates will be distributed to subscribers.

Signed in Washington, DC this 22nd day of December, 2004.

Terry Sullivan,

Acting Chief, Branch of Construction Wage Determinations.

[FR Doc. 04–28323 Filed 12–30–04; 8:45 am]

BILLING CODE 4510–27–M

THE NATIONAL FOUNDATION ON THE ARTS AND HUMANITIES

Proposed Collection, Comment Request, Program Guidelines, Report Forms, Reviewer Forms

AGENCY: Institute of Museum and Library Services.

ACTION: Notice of requests for information collection, submission for OMB review.

SUMMARY: The Institute of Museum and Library Services as part of its continuing

effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95), 44 U.S.C. 3508(2)(A). This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently the Institute of Museum and Library Services is soliciting comments concerning the proposed collection of application information for Librarians for the 21st Century, Native American/Native Hawaiian Library Services reporting forms, Grants for State Library Administrative Agencies financial report form, and reviewer forms.

A copy of the proposed information collection request can be obtained by contacting the individual listed below in the addresses section of this notice.

DATES: Written comments must be submitted to the office listed in the addressee section below on or before February 2, 2005.

IMLS is particularly interested in comments that help the agency to:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collocation of information including the validity of the methodology and assumptions used;
- Enhance the quality, utility and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electric submissions of responses.

ADDRESSES: Send comments to: Rebecca Danvers, Director, Office of Research and Technology, Institute of Museum and Library Services, 1100 Pennsylvania Ave., NW., Room 223, Washington, DC 20506. Dr. Danvers can be reached on Telephone: 202–606–2478 Fax: 202–606–0395 or by e-mail at *rdanvers@imls.gov.*

SUPPLEMENTARY INFORMATION:

Background: The Institute of Museum and Library Services is an independent Federal grant-making agency authorized by the Museum and Library Services Act, 20 U.S.C. 9101, *et seq.* The IMLS provides a variety of grant programs to assist the nation's museums and libraries in improving their operations and enhancing their services to the public. Museums and libraries of all sizes and types may receive support from IMLS programs. The Museum and Library Services Act, 20 U.S.C. 9101, *et seq.* authorizes the Director of the Institute of Museum and Library Services to make grants to museums, libraries, and other entities as the Director considers appropriate, and to Indian tribes and to organizations that primarily serve and represent Native Hawaiians. In addition, IMLS awards financial assistance to State Library Administrative Agencies, which are responsible for promoting library services throughout the country.

II. Current Actions

To administer these programs of grants, cooperative agreements and contracts, IMLS must develop application guidelines, reports and collect information about reviewers.

Agency: Institute of Museum and Library Services.

Title: Application Guidelines, reporting forms, reviewer forms.

OMB Number: 3137–0049, n/a.

Agency Number: 3137.

Frequency: Annually.

Affected Public: Museums, museum organizations, libraries, library organizations, institutions of higher education, Indian tribes and to organizations that primarily serve and represent Native Hawaiians, and museum and library professionals.

Number of Respondents: 3,100.

Estimated Time Per Respondent: .25–40 hours.

Total Burden Hours: 400.

Total Annualized capital/startup costs: 0.

Total Annual costs: 0.

Contact: Rebecca Danvers, Director of the Office of Research and Technology, Institute of Museum and Library Services, 1100 Pennsylvania Avenue, NW., Washington, DC 20506, telephone (202) 606–2478.

Dated: December 28, 2004.

Rebecca Danvers,

Director, Office of Research and Technology.

[FR Doc. 04–28698 Filed 12–30–04; 8:45 am]

BILLING CODE 7836–01–M

NUCLEAR REGULATORY COMMISSION

[Docket No. 040–07982]

Notice of Issuance of License Amendment for Termination of License SUB–00971 for ATK Ordnance and Ground Systems, LLC Arden Hills, Minnesota

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of availability.

FOR FURTHER INFORMATION CONTACT: George M. McCann, Senior Health Physicist, Decommissioning Branch, Division of Nuclear Material Safety, Region III, U.S. Nuclear Regulatory Commission, 2443 Warrenville Road, Lisle, Illinois 60532; Telephone: (630) 829–9856; fax number: (630) 515–1259; e-mail: *gmm@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

The Nuclear Regulatory Commission (NRC) is issuing a license amendment to terminate Source Material License No. SUB–00971 issued to ATK Ordnance and Ground Systems, LLC, (ATK) and to authorize for unrestricted use its former depleted uranium production facilities, located at the Twin Cities Army Ammunition Plant, Arden Hills, Minnesota. On October 25, 2001, the NRC amended ATK's license to include an NRC-approved decommissioning plan supported by an Environmental Assessment and a Finding of No Significant Impact. These documents addressed the impacts of ATK's request to decommission its former depleted uranium facilities, including final status survey plans and the licensee's intent to terminate Source Material License No. SUB–00971. The NRC published a Notice of the Agency's proposed action and opportunity to request a hearing in the **Federal Register** (63 FR 28015) on May 21, 1998.

In a letter dated June 2, 2004, ATK requested termination of its NRC radioactive source material license. The NRC staff documented its review of ATK's final status surveys in a December 13, 2004, Safety Evaluation Report. Based on its review, the staff concluded that all licensable radioactive material had been removed from the ATK facility and residual radioactive material attributable to licensed activities did not exceed NRC unrestricted release criteria cited in its decommissioning plan.

II. Safety Evaluation Report (SER) Summary

The purpose of the amendment is to terminate ATK's source material license and authorize for unrestricted release the licensee's former depleted uranium production facilities located at the Twin Cities Army Ammunition Plant, Arden Hills, Minnesota. The licensee started production of uranium munitions in 1976, and ceased production activities during 1988. The licensee conducted surveys of its former facilities and site and provided on June 18, 2004, information to the NRC to demonstrate that the site meets the licensee's termination criteria specified in its NRC-approved decommissioning plan.

The staff prepared the SER in support of the license amendment. Based on its review, the NRC staff has determined that the licensee's final status surveys are adequate to demonstrate compliance with radiological criteria for license termination, and that ATK has demonstrated that the former depleted uranium production site radiological conditions comply with the radiological criteria for license termination. The NRC staff has reviewed the proposed amendment and has determined that the proposed termination will have no adverse effect on the public health and safety or the environment.

III. Further Information

Documents related to this action, including the application for amendment and supporting documentation, are available electronically at the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html.* From this site, you can access the NRC's Agencywide Document Access and Management System (ADAMS), which provides text and image files of NRC's public documents. The ADAMS accession numbers for the documents related to this notice are: the ATK letter dated June 2, 2004 (Accession No. ML042870518); the licensee's letter dated June 18, 2004, with Safety and Ecology Corporation ''Final Status Survey Report, Depleted Uranium Facilities, Twin Cities Army Ammunition Plant, New Brighton, Minnesota,'' Project 1350, Revision 2, June 2004 (Accession No. ML042950257) attached, and the SER summarized above (Accession No. ML043560261). If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC Public Document Room (PDR) Reference staff at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr@nrc.gov.*

Please note that on October 25, 2004, the NRC terminated public access to ADAMS and initiated an additional security review of publicly available documents to ensure that potentially sensitive information is removed from the ADAMS database accessible through the NRC's Web site. Interested members of the public may obtain copies of the referenced documents for review and/or copying by contacting the Public Document Room pending resumption of public access to ADAMS. The NRC Public Documents Room is located at NRC Headquarters in Rockville, MD, and can be contacted at (800) 397–4209 or (301) 415–4737 or *pdr@nrc.gov.*

These documents may also be viewed electronically on the public computers located at the NRC's PDR, O 1 F21, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852. The PDR reproduction contractor will copy documents for a fee.

Dated at Lisle, Illinois, this 21st day of December 2004.

For the Nuclear Regulatory Commission.

Kenneth G. O'Brien,

Chief, Decommissioning Branch, Division of Nuclear Materials Safety, Region III.

[FR Doc. 04–28675 Filed 12–30–04; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50928; File No. SR–BSE–2004–59]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Boston Stock Exchange, Inc. To Amend the Exchange's Rule Relating to its Regulatory Transaction Fee

December 23, 2004.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 17, 2004, the Boston Stock Exchange, Inc. (''BSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in items I, II, and III below, which items have been prepared by the Exchange. The proposed rule change has been filed by BSE as a ''non-controversial'' rule change pursuant to 19(b)(3)(A) of the Act[3] and Rule 19b–4(f)(6) thereunder,[4] which tenders the proposal effective on filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(6).

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend chapter XXIII, section 2 of the BSE Rules relating to the Exchange's regulatory transaction fee.

The text of the proposed rule change is set forth below. Proposed new language is italicized; deletions are bracketed.

* * * * *

Rules of the Boston Stock Exchange Chapter XXIII: Stamp Taxes—Transaction Fee

Sec. 1—No change.

Regulatory Transaction Fee [Under Securities Exchange Act of 1934]

Sec. 2. So long as the Exchange shall be registered as a national securities exchange, there shall be paid to the Exchange by each member of member-organization monthly in such manner and at such time as the Exchange shall direct, *a regulatory transaction fee. The monthly regulatory transaction fee shall equal the member's aggregate dollar amount of covered sales occurring that month (other than those resulting from options transactions) divided by the Exchange's aggregate dollar amount of covered sales (other than those resulting from options transactions) occurring that month, multiplied by the Section 31 fees payable by the Exchange to the Commission for that month, multiplied by the Section 31 fees payable by the Exchange to the Commission for that month (other than those resulting from options transactions).* [the sum of one cent for each $300 or fraction thereof of the dollar volume of the sales of securities upon the Exchange (whether or not cleared through the Boston Stock Exchange Clearing Corporation) by such member or member-organization during the preceding month]. [Any such member or member-organization required by the foregoing Rule to pay any sum to the Exchange in respect of any sale upon the Exchange shall charge and collect from the person for whom he or it was acting in making such transaction, the sum of one cent for each $300 or fraction thereof of the dollar amount involved in such transaction.]

Sec. 3—No change.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organizations's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend chapter XXIII, section 2 of the BSE Rules regarding transaction fees to change language in the rule to represent that the Exchange will be assessing a fee to each member for sales of securities on the Exchange and that the aggregate amount of all such fees assessed to Exchange members will reflect as nearly as possible the fee assessed to the Exchange by the Commission pursuant to section 31 of the Act.[5] The transaction fee covered by this rule is applicable to equity securities only. The Exchange anticipates filing a rule in the future to assess a transaction fee for options transactions.

The regulatory transaction fee, similar to the fee the Exchange has collected in the past, will equal as nearly as possible, the member's aggregate dollar amount of cover sales[6] occurring that month (other than those resulting from options transactions) divided by the Exchange's aggregate dollar amount of covered sales (other than those resulting from options transactions) occurring that month, multiplied by the amount of section 31 fees payable by the Exchange to the Commission for that month (other than those resulting from options transactions). To the extent that additional funds are collected, they will be used for other proper regulatory purposes.

The Exchange is also proposing eliminating language in chapter XXIII, section 2 of the BSE Rules, which directs BSE members to charge persons for whom the member makes a transaction on the Exchange an amount equivalent to the charge which the member is assessed. Since fees assessed under section 31 of the Act are the responsibility of the Exchange, BSE will not require, by rule or otherwise, that its members charge their customers in any manner a fee for which the ultimate customer is not responsible.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with section 6(b) of the Act,[7] in general, and section 6(b)(4) of the Act,[8] in particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among its members.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any inappropriate burden on competition

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received comments in connection with the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because, the foregoing proposed rule change (1) does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) by its terms, does not become operative until 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, and the Exchange provided the Commission with written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, it has become effective pursuant to section 19(b)(3)(A) of the Act[9] and Rule 19b–4(f)(6) thereunder.[10]

BSE has requested that the Commission waive the 30-day operative delay. The Commission believes waiving the 30-day operative delay is consistent with the protection of investors and the public interest, because doing so will make chapter XXIII, section 2 of the BSE Rules consistent with the Commission's guidance on section 31 of the Act as quickly as possible. For these reasons, the Commission hereby designates the proposal to be effective and operative upon filing with the Commission.[11]

At any time within 60 days of the filing of this proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*.

Please include File Number SR–BSE–2004–59 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR–BSE–2004–59. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal

[5] 15 U.S.C. 78ee.

[6] *See* 17 CFR 240.31(a)(6).

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(4).

[9] 19 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(6).

[11] For purposes only of accelerating the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

office of BSE. All comments received will be posted without change; the Commission does not edit personal identify8ing information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–BSE–2004–59 and should be submitted on or before January 24, 2009.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[12]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–28669 Filed 12–30–04; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50907; File No. SR–CBOE–2004–04]

Self-Regulatory Organizations; Chicago Board Options Exchange, Inc.; Order Granting Approval to Proposed Rule Change and Amendment No. 1 Thereto To Amend the Exchange's Guaranteed Participation Rule Relating to Facilitation and Crossing Transactions

December 22, 2004.

On January 16, 2004, the Chicago Board Options Exchange, Inc. (''CBOE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'' or ''SEC''), pursuant to section 19(b)(1) of the Securities Exchange act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend CBOE Rule 6.74, Crossing Orders, relating to facilitation and crossing transactions. On November 3, 2004, CBOE submitted Amendment No. 1 to the proposed rule change.[3] The proposed rule change, as amended, was published for comment in the **Federal Register** on November 18, 2004.[4] The Commission received no comments on the proposal.

CBOE proposes to amend Exchange Rule 6.74 with respect to the guaranteed participation to which a floor broker is entitled when seeking to execute crossing and facilitation transactions. Under the current rule, after requesting a market from the trading crowd, a floor broker seeking to cross an order he or she is holding with another order, or, in the case of a public customer order, with a facilitation order from the firm from which the public customer order originated, is entitled to a guaranteed participation of 20% when the order trades at a price that matches the price given by the trading crowd in response to the initial request for a market, and 40% when the order trades at a price that improves upon that price. The proposed rule change would entitle the floor broker to a 40% guarantee in both cases.[5]

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange,[6] and, in particular, the requirements of section 6(b)(5) of the Act.[7] The Commission has found with respect to participation guarantees in other contexts that a maximum guarantee of 40% is not inconsistent with statutory standards of competition and free and open markets.[8]

It is therefore ordered, pursuant to section 19(b)(2) of the Act[9], that the proposed rule change (File No. SR–CBOE–2004–04), as amended, be, and hereby is, approved.

For the Commission, by the Dvision of Market Regulation, pursuant to delegated authority.[10]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–28670 Filed 12–30–04; 8:45 am]

BILLING CODE 8010–10–M

SECURITIES AND EXCHANGE COMMISSION

[Docket No. 34–50924; File No. SR–CBOE–2004–67]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto Relating To Split Price Priority

December 23, 2004.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 20, 2004, the Chicago Board Options Exchange, Incorporated (''CBOE'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in items I, II, and III below, which items have been prepared by the CBOE. On December 17, 2004, CBOE amended the proposed rule change (''Amendment No. 1'').[3] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

CBOE proposes to amend its split price trading rule. The text of the proposed rule change, as amended, is set forth below. Proposed new language is in *italics*; deletions are in [brackets].

* * * * *

Rule 6.47. Priority on Split Price Transactions Occurring in Open Outcry

(a) Purchase *or sale* priority. If a member purchases (*sells*) one or more option contracts of a particular series at a particular price or prices, he shall, at the next lower (*higher*) price at which a

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[12] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Letter from Stephen Youhn, Legal Division, CBOE, to Nancy J. Sanow, Assistant Director, Dvision of of Market Regulation (''Division''), Commission, dated November 2, 2004 (''Amendment No. 1''). Amendment No. 1 replaced and superseded the original filing in its entirety.

[4] *See* Securities Exchange Act Release No. 50655 (November 10, 2004), 69 FR 67614.

[5] These guaranteed percentages apply after all public customer orders that were on the limit order book and represented in the trading crowd at the time the market was established have been satisfied. The proposal would also amend CBOE Rule 6.74(d)(v) to make corresponding changes to the DPM participation entitlement as it pertains to facilitation and crossing orders. Specifically, the rule would be amended to state that DPMs are not entitled to any guaranteed participation for trades occurring pursuant to CBOE Rule 6.74(d) unless the floor broker crosses less than its guaranteed 40%, in which case the DPMs guarantee would be a percentage that, when combined with the firm's percentage, does not exceed 40% of the order. The intent of the provision is that the aggregate of the guarantees may not exceed 40% of the remainder of the order after public customer orders have been satisfied. Telephone conversation between Stephen Youhn, Legal Division, CBOE, and Ira Brandriss, Assistant Director, Division, Commission, on December 17, 2004.

[6] In approving this proposed rule change, the Commission has considered the proposed rule's impact of efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[7] 15 U.S.C. 78f(b)(5).

[8] *See, e.g.,* Securities Exchange Act Release Nos. 42455 (February 24, 2000), 65 FR 11388 (March 2, 2000) at 11398; and 43100 (July 31, 2000), 65 FR 48778 (August 9, 2000) at notes 96–99 and accompanying text.

[9] 15 U.S.C. 78s(b)(2).

[10] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] In Amendment No. 1, CBOE amended the proposed rule change to: (i) Remove the parenthetical ''(or a reasonably larger number)'' from current CBOE Rule 6.47(a) and from the proposed rule text of CBOE Rule 6.47(b); and (ii) revise proposed Interpretations and Policies .01 to clarify that if a floor broker is required to yield, he must yield to ''orders for the accounts of non-members.''

member other than the Board Broker or Order Book Official is bidding (*offering*), have priority in purchasing (*selling*) up to the equivalent number [(or a reasonably larger number)] of option contracts of the same series that he purchased (*sold*) at the higher (*lower*) price or prices, but only if his bid (*offer*) is made promptly and the purchase (*sale*) so effected represents the opposite side of a transaction with the same order or offer (*bid*) ass the earlier purchase or purchases (*sale or sales*). This paragraph only applies to transactions effected in open outcry.

(b) [Sale priority. If a member sells one or more option contracts of a particular series at a particular price or prices, he shall, at the next higher price at which a member other than the Board Broker or Order Book Official is offering, have priority in selling up to the equivalent number (or a reasonably larger number) of option contracts of the same series that he sold at the lower price or prices, but only if his offer is made promptly and the sale so effected represents the opposite side of a transaction with the same order or bid as the earlier sale or sales. This paragraph only applies to transactions effected in open outcry.] *Purchase or sale priority for orders of 100 contracts or more. If a member purchases (sells) fifty or more option contracts of a particular series at a particular price or prices, he shall, at the next lower (higher) price have priority in purchasing (selling) up to the equivalent number of option contracts of the same series that he purchased (sold) at the higher (lower) price or prices, but only if his bid (offer is made promptly and the purchase (sale) so effected represents the opposite side of a transaction with the same order or offer (bid) as the earlier purchase or purchases (sale or sales). The appropriate Exchange committee may increase the ''minimum qualifying order size'' above 100 contracts for all products under its jurisdiction. Announcements regarding changes to the minimum qualifying order size shall be made via Regulatory Circular. This paragraph only applies to transactions effected in open outcry.*

(c) No Change.

*Interpretations and Policies. * * **

.01 Floor brokers are able to achieve split price priority in accordance with paragraphs (a) and (b) above. Provided, however, that a floor broker who bids (offers) on behalf of a non-market-maker CBOE member broker-dealer (''CBOE member BD'') must ensure that the CBOE member BD qualifies for an exemption from Section 11(a)(1) of the Exchange Act or that the transaction satisfies the requirements of Exchange Act Rule 11a2–2(T), otherwise the floor broker must yield priority to orders for the accounts of non-members.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change, as amended, and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

I. Purpose

CBOE Rule 6.47 establishes priority principles for split-price transactions. Generally, a member buying (selling) at a particular price shall have priority over other members in purchasing (selling) up to an equivalent number of contracts of the same at the next lower (higher) price. Awarding split price priority serves as an inducement to members to bid (offer) more aggressively for an order that may require a split-price execution by giving them priority at the next lower (higher) price point. For example, assume the market is $1.00–1.20, 300-up when a floor broker (''FB'') receives instructions from a customer that it would like to buy 500 options at a price or prices no higher than $1.20. The FB could attempt to execute the order in open outcry at a price better than the displayed market of $1.20. Assume a market maker (''MM'') in the crowd is willing to sell 250 contracts at $1.15 provided he can also sell the remaining 250 contracts at $1.20. Under current rules, that MM could offer $1.15 for 250 contracts and then, by virtue of the split price priority rule, he/she would have priority for the balance of the order (up to 250 contracts) over other crowd members. If executed, the resulting net price of $1.175 is better than the current displayed market of $1.20, which results in a better fill for the customer.[4]

One limitation on the ability of crowd participants to use the split price priority rule is the rule's requirement that orders in the limit order book (''book'') have priority over the member attempting to fill the balance of the order at the split price. Using the example above, if the $1.20 price represented orders in the book, those orders would have priority over the MM at $1.20. This means that a MM who is willing to trade at $1.15 and $1.20 may be completely unwilling to trade at the better price of $1.15 if he/she cannot trade the balance of the order at $1.20 because of the requirement to yield to existing customer interest in the book. This jeopardizes the FB's ability to execute the first part of the order at a price of $1.15, thereby potentially making it difficulty to achieve price improvement for the customer on CBOE. Instead, the order may trade at another exchange that has no impediments, *i.e.,* no customer interest at those price levels. Accordingly, the purpose of this proposal is to adopt a limited exception to the existing priority requirement.

Under the newly-proposed paragraph (b) to CBOE Rule 6.47, a member with an order for at least 100 contracts and who buys (sells) at least 50 contracts at a particular price would have priority over all others in purchasing (selling) up to an equivalent number of contracts of the same order at the next lower (higher) price.[5] Using the above example, the MM trading at $1.15 would have priority over members and orders in the book at $1.20 to trade at $1.20 with the balance of the order in the trading crowd. The Exchange believes that the proposal would lead to more aggressive quoting by MMS, which in turn could lead to better executions. As indicated above, a MM might be willing to trade at a better price for a portion of an order if he/she were assured of trading with the balance of the order at the next pricing increment. As a result, FBs representing orders in the trading crowd might receive better-priced executions. As proposed, the appropriate Exchange committee would have the ability to increase the minimum qualifying order size to a number larger than 100 contracts. Any changes, which would have to apply to all products under the committee's jurisdiction, would be announced to the membership a via Regulatory Circular.

The Exchange believes that it would be reasonable to make a limited exception to the customer priority rule

[4] If successful, two trades will be reported (at $1.15 and 1.20) and the net price result to the customer will be $1.175.

[5] Orders for less than 100 contracts would be unaffected by this proposal. The Exchange also would take the opportunity to consolidate current paragraphs (a) and (b) into one paragraph (paragraph (a)). This consolidation would not effect the operation of the rule in any way; it simply would make the rule shorter.

to allow split price trading. In this regard, the proposed exception would be similar in operation to the limited priority exception that exists for complex orders (contained in CBOE Rules 6.45 and 6.45A). The complex order priority exception generally provides that a crowd member affecting a qualifying complex order may trade ahead of the book on one side of the order provided the other side of the order betters the book. This exception was intended to facilitate the trading of complex orders, which by virtue of their multi-legged composition could be more difficult to trade without a limited exception to the priority rule for one of the legs. The purpose behind the proposed split-price priority exception is the same—to facilitate the execution of large orders, which by virtue of their size and the need to execute them at multiple prices may be difficult to execute without a limited exception to the priority rules. The proposed exception would operate in the same manner as the complex order exception by allowing a member affecting a trade that betters the market to have priority on the balance of that trade at the next pricing increment, even if there are orders in the book at the same price.

To address potential concerns regarding section 11(a) of the Act,[6] the Exchange proposes to adopt new Interpretations and Policies .01 (''I&P'') to CBOE Rule 6.47. Section 11(a) generally prohibits members of national securities exchanges from effecting transactions for the member's own account, absent an exemption. With respect to the proposal, there could be situations where because of the limited exception to customer priority, orders on behalf of members could trade ahead of orders of nonmembers in violation of section 11(a).[7] The proposed I&P would make clear that FBs may avail themselves of the split-price priority rule, but that they would be obligated to ensure compliance with section 11(a). In this regard, a FB bidding (offering) on behalf of a non-market-maker CBOE member broker-dealer (''CBOE member BD'') would be required to ensure that the CBOE member BD qualifies for an exemption from section 11(a)(1) of the Act or that the transaction satisfies the requirements of Rule 11a2–2(T). Otherwise, the FB would be required to yield priority to order for the account of non-members. The Exchange further proposed to amend paragraph (a) of Rule 6.47 to remove the parenthetical (''or a reasonably larger number'').[8] The Exchange believes the language to be necessary to achieve the intent of the rule, which is to allow FBs to have priority for up to an equivalent number of contracts purchased or sold at the preceding price, as specified in the rule.

2. Statutory Basis

For the above reasons, the Exchange believes that the proposed rule change would enhance competition. Thus, CBOE believes that the proposal is consistent with the Act and the rules and regulations under the Act applicable to a national securities exchange and, in particular, the requirements of section 6(b)[9] of the Act. Specifically, the Exchange believes that the proposed rule change is consistent with the section 6(b)[10] requirements that the rules of an exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change, as amended, would impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change, as amended, or

(B) Institute proceedings to determine whether the proposed rule change, as amended, should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–CBOE–2004–67 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR–CBOE–2004–67. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available of inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the CBOE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

All submissions should refer to File Number SR–CBOE–2004–67 and should be submitted on or before January 24, 2005.

[6] 15 U.S.C. 78k(a).

[7] For example, assume FB A walks into the trading crowd attempting to find a crowd member willing to effect a split-price transaction. FB B, who is representing either a proprietary or member BD order, expresses interest. In this instance, section 11(a) could be implicated, absent an exemption.

[8] *See* Amendment No. 1.

[9] 15 U.S.C. 78(f)(b).

[10] 15 U.S.C. 78(f)(b)(5).

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[11]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–28671 Filed 12–30–04; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50860; File No. SR–NASD–2004–166]

Self Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Granting Approval to Proposed Rule Change Modifying the Other Securities Fee Schedule

December 15, 2004.

On October 29, 2004, the National Association of Securities Dealers, Inc. (''NASD''), through its subsidiary. The Nasdaq Stock Market, Inc. (''Nasdaq''), filed with the Securities and Exchange Commission (''Commission''), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change modifying the Other Securities fee schedule in NASD Rule 4530 by establishing a new, separate, non-refundable application fee for ''other securities'' and SEEDS and raising the applicable annual fee levels. The proposed rule change was published for comment in the **Federal Register** on November 10, 2004.[3] The Commission received no comments on the proposal.

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association[4] and, in particular, the requirements of section 15A of the Act[5] and the rules and regulations thereunder. The Division finds specifically that the proposed rule change is consistent with section 15A(b)(5) of the Act,[6] which requires that the rules of an association provide for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility or system which the association operates or controls. Specifically, the increase is intended to reflect the costs that Nasdaq has represented it incurs for the services provided to issuers.

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[7] that the proposed rule change (File NO. SR–NASD–2004–166) be, and hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[8]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–27942 Filed 12–30–04; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50926; File No. SR–NASD–2004–110]

Self-Regulatory Organizations; Order Approving a Proposed Rule Change, and Amendment Nos. 1, 2 and 3 Thereto, by National Association of Securities Dealers, Inc. Relating to Divestiture of Its Interest in the American Stock Exchange LLC

December 23, 2004.

I. Introduction

On July 16, 2004 the National Association of Securities Dealers, Inc. (''NASD'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission''), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to reflect NASD's pending divestiture of its ownership interest in the American Stock Exchange LLC (''Amex'') pursuant to a Transaction Agreement between Amex and NASD wherein the the Amex Membership Corporation will become the sole owner of Amex (the ''Transaction'').[3] NASD amended the proposal on August 10, 2004,[4] August 25, 2004,[5] and September 3, 2004.[6] The proposed rule change was published for comment in the **Federal Register** on September 23, 2004.[7] A correction to the proposed rule change was published in the **Federal Register** on October 5, 2004.[8] No comments were received on the proposal. This order approves the proposal, as amended.

II. Description of the Proposal

The proposed rule change amends provisions of NASD's By-Laws to reflect NASD's pending divestiture of its ownership of Amex as a result of the Transaction; make parallel amendments to the definitional and conflict-of-interest provisions of the By-Laws of NASD Regulation, Inc. (''NASD Regulation'') and NASD Dispute Resolution, Inc. (''Dispute Resolution''); terminate certain undertakings NASD assumed when it acquired Amex in 1998 (the ''1998 Undertakings''); and make certain other clarifying amendments. A brief description of the proposed changes is set forth below.

NASD By-Law Article I (Definitions)

The proposed amendments eliminate references to Amex and/or Nasdaq from the definitions of ''Industry Director'' and ''Industry Governor,'' ''Non-Industry Director'' and ''Non-Industry Governor,'' and ''Public Director'' and ''Public Governor.'' NASD proposes to replace references to Amex and/or Nasdaq in each of those definitions with the phrase ''a market for which NASD provides regulation.'' Other references to Amex's ''Floor Governor,'' ''Amex,'' ''Amex Board'' and ''Chief Executive Officer of Amex'' also have been eliminated. NASD also proposes further clarifying amendments to the definition of ''Non-Industry Director'' and ''Non-Industry Governor'' to include an officer or employee of an issuer of unlisted securities that are traded in the over-the-counter market. NASD represents that this particular change reflects NASD's historical interpretation of the ''Non-Industry Director'' and ''Non-Industry

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[11] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 50629 (November 3, 2004), 69 FR 65237.

[4] In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[5] 15 U.S.C. 78*o*–3.

[6] 15 U.S.C. 78*o*–3(b)(5).

[7] 15 U.S.C. 78s(b)(2).

[8] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Exchange Act Release No. 50057 (July 22, 2004); 69 FR 45091, July 28, 2004) (SR–AMEX–2004–50) for a detailed description of the Transaction.

[4] *See* letter from Barbara Z. Sweeney, Senior Vice President and Corporate Secretary, NASD, to Katherine A. England, Assistant Director, Division of Market Regulation (''Division''), Commission, dated August 10, 2004 (''Amendment No. 1''). Amendment No. 1 replaced NASD's original filing in its entirety.

[5] *See* letter from Barbara Z. Sweeney, Senior Vice President and Corporate Secretary, NASD, to Katherine A. England, Assistant Director, Division, Commission, dated August 25, 2004 (''Amendment No. 2''). Amendment No. 2 replaced NASD's earlier amended filing in its entirety.

[6] *See* letter from Barbara Z. Sweeney, Senior Vice President and Corporate Secretary, NASD, to Katherine A. England, Assistant Director, Division, Commission, dated September 2, 2004 (''Amendment No. 3''). Amendment No. 3 modified Exhibit 1 and made certain technical corrections to the proposal. Amendment No. 3 replaced NASD's earlier amended filing in its entirety.

[7] *See* Securities Exchange Act Release No. 50403 (September 16, 2004), 69 FR 57119.

[8] *See* Securities Exchange Act Release No. 50403A (September 29, 2004), 69 FR 59630.

Governor'' definitions. Parallel changes also have been proposed for the definitional provisions of the NASD Regulation and Dispute Resolution By-Laws. NASD also proposes to eliminate other definitions relating to Amex and Amex-related entities in the NASD Regulation and Dispute Resolution By-Laws.

NASD By-Law Article VII (Board of Governors)

In section 4 of Article VII, NASD proposes to eliminate two seats on the NASD Board that have been reserved for the Chief Executive of Amex and an Amex Floor Governor. The proposal reduces the total number of Governors on the NASD Board from a range of 17–27 to a range of 15–25. NASD also proposes to eliminate the term provisions in section 5 of Article VII that pertains to Amex's Chief Executive Officer, and that sets the maximum permissible term of the Amex Floor Governor.

NASD By-Law Article IX (Committees)

NASD proposes to eliminate the requirements that at least one Governor of Amex be included on the NASD Executive Committee and that at least two members of the NASD Executive Committee be members of neither Amex nor NASD Regulation Boards. Thus, with the changes, the NASD Executive Committee would be composed of no fewer than five and no more than eight Governors, including the Chief Executive Officer of the NASD and at least one Director of NASD Regulation.

NASD Bylaw Article XV (Limitation of Powers)

Section 4 of Article XV of the NASD Bylaws governs participation of NASD in transactions in which Amex Governors have an interest. Section 4(b) of Article XV provides that a contract or transaction in which an Amex Governor has an interest may be permitted if certain disclosures are made and the contract or transaction is approved by an affirmative vote of a majority of a quorum of disinterested Governors. Currently, an Amex-affiliated Governor could be counted as a disinterested Governor for purposes of determining the presence of a quorum. NASD proposes to eliminate Amex from the quorum provision and as a result, NASD represents that an Amex-affiliated Governor will no longer be counted as disinterested for purposes of determining the presence of a quorum at the portion of the meeting of the NASD Board that authorizes a contract or transaction with Amex. Parallel changes are proposed for the conflict-of-interest provisions of the NASD Regulation and Dispute Resolution By-Laws.

1998 Undertakings

Amex proposes to withdraw the principles that it adopted in 1998 that would guide the NASD in fulfilling its responsibilities as parent company of Amex with ultimate responsibility for Amex's compliance with its statutory responsibilities as a self-regulatory organization. In the 1998 Undertakings, among other things, NASD represented that it would exercise its powers and its managerial influence to ensure that Amex fulfilled its self-regulatory obligations by directing Amex to take action necessary to effectuate its purposes and functions as a national securities exchange operating pursuant to the Act, and ensuring that Amex had, and appropriately allocated, such financial, technological, technical, and personnel resources as may be necessary or appropriate to meet its obligations under the Act. NASD also committed to refraining from taking any action with respect to Amex that would impede efforts by Amex to carry out its self-regulatory obligations.[9]

III. Commission Findings

The Commission finds the proposed rule change, as amended, is consistent with section 15A of the Act[10] and the rules and regulations thereunder applicable to a national securities association. In particular, the Commission find the proposed rule change is consistent with section 15A(b)(6) of the Act,[11] which requires that NASD's rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and to protect investors and the public interest.[12]

The Commission finds that it is appropriate for NASD to delete any mandatory representation of Amex on the NASD Board or NASD Executive Committee. Following the elimination of Amex representatives on the NASD's Board, the Board will continue to be a majority independent because the NASD By-Laws require that the number of Non-Industry Governors shall exceed the number of Industry Governors.[13] Given the NASD's pending divestiture of its ownership interest and control over the Amex, the Commission finds that it is appropriate for the NASD to withdraw the 1998 Undertakings. Upon the closing of the Transaction, NASD will no longer maintain any ownership in or control over Amex. Therefore the 1998 Undertakings, which imposed upon NASD certain obligations as the owner of Amex, will no longer be applicable.

The Commission finds that the changes proposed by NASD that delete references to Amex and replace those references with broader provisions are appropriate. For example, NASD proposes to amend the definitions of ''Industry Director'' and ''Industry Governor,'' ''Non-Industry Director'' and ''Non-Industry Governor,'' and ''Public Director'' and ''Public Governor'' by deleting references to Amex and/or Nasdaq with ''a market regulated by the NASD.'' The Commission believes that this change is appropriate because it takes into account NASD's current—and anticipated—contractual relationship with other market centers, and more importantly, clarifies how an individual's affiliation with such a market center might affect his/her qualification for that particular classification. The same rationale makes corresponding changes to the same definitions in the NASD Regulation and Dispute Resolution By-Laws appropriate.

The Commission also finds that the clarifying amendments that NASD proposes are appropriate. For example, NASD's definition of Non-Industry Director and Non-Industry Governor previously included an officer or director of ''securities traded in the over-the-counter market.'' As noted above, NASD is clarifying this prong of that definition to include an officer or employee of an issuer of unlisted securities. The NASD proposes this change to align the rule text with NASD's current practice of how it applies this prong of the definition of Non-Industry Director and Non-Industry Governor. NASD stated that this is not a substantive change.[14] In addition, the

[9] *See* Exchange Act Release No. 40443 (September 16, 1998), 63 FR 51108 (September 24, 1998) (File No. SR–NASD–98–67—Policies Regarding Authority Over American Stock Exchange LLC and Composition of Board of Governors of American Stock Exchange LLC); *See also* Exchange Act Release No. 40622 (October 30, 1998), 63 FR 59819 (November 5, 1998) (order approving proposed rule change and implementing NASD's undertakings regarding Amex).

[10] 15 U.S.C. 78*o*–3.

[11] 15 U.S.C. 78*o*–3(b)(6).

[12] In approving this rule change, the Commission has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[13] The Commission also notes that the NASD's By-Laws continue to require that a certain number of Public Governors be on the NASD Board, depending on the exact number of NASD Governors in total.

[14] Specifically, an officer or employee of a listed issuer could still qualify as an Industry Director or Industry Governor or Public Director or Public Governor if the officer or employee met the requirements for those categories, and could still

Commission believes that deletion of Amex from the quorum requirements of NASD, NASD Regulation and Dispute Resolution's By-Laws governing participation in transactions in which Amex Governors have a conflict of interest is appropriate because it clarifies that an Amex-affiliated Governor cannot be counted as disinterested for quorum purposes in a meeting of the NASD Board that authorizes a contract or transaction with Amex. Finally, the Commission finds that it is appropriate to eliminate the requirement that at least two members of the Executive Committee be members of neither the Amex nor NASD Regulation Boards because the original concern that prompted this requirement—that market interests might dominate the NASD Board—no longer poses any regulatory or governance concern.

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[15] that the proposed rule change, NASD 2004–110, as amended, be, and hereby is approved. The proposed rule change shall be effective upon the closing of the Transaction.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. E4–3907 Filed 12–30–04; 8:45 am]

BILLING CODE 8010–01–P

qualify as a Non-Industry Director or Non-Industry Governor under the prong of that definition that states that a Non-Industry Director or Non-Industry Governor is ''any other individual who would not be an Industry Director.'' Thus, before and after this change, an officer or employee of a listed issuer could qualify in any of these three categories.

[15] 15 U.S.C. 78s(b)(2).

DEPARTMENT OF STATE

Bureau of Nonproliferation

[Public Notice 4946]

Imposition of Nonproliferation Measures Against Nine Foreign Entities, Including a Ban on U.S. Government Procurement, and Removal of Penalties From One Entity

AGENCY: Department of State.

ACTION: Notice.

SUMMARY: A determination has been made that nine entities have engaged in activities that require the imposition of measures pursuant to Section 3 of the Iran Nonproliferation Act of 2000, which provides for penalties on entities for the transfer to Iran since January 1, 1999, of equipment and technology controlled under multilateral export control lists (Australia Group, Chemical Weapons Convention, Missile Technology Control Regime, Nuclear Suppliers Group, Wassenaar Arrangement) or otherwise having the potential to make a material contribution to the development of weapons of mass destruction (WMD) or cruise or ballistic missile systems. The latter category includes (a) items of the same kind as those on multilateral lists, but falling below the control list parameters, when it is determined that such items have the potential of making a material contribution to WMD or cruise or ballistic missile systems, (b) other items with the potential of making such a material contribution, when added through case-by-case decisions, and (c) items on U.S. national control lists for WMD/missile reasons that are not on multilateral lists. It was also determined that sanctions imposed on a Spanish entity, effective September 23, 2004 (69 FR 4845) pursuant to the Iran Nonproliferation Act of 2000, no longer apply.

DATES: *Effective Date:* December 27, 2004.

FOR FURTHER INFORMATION CONTACT: On general issues: Vann H. Van Diepen, Office of Chemical, Biological and Missile Nonproliferation, Bureau of Nonproliferation, Department of State (202–647–1142). On U.S. Government procurement ban issues: Gladys Gines, Office of the Procurement Executive, Department of State (703–516–1691).

SUPPLEMENTARY INFORMATION: Pursuant to Sections 2 and 3 of the Iran Nonproliferation Act of 2000 (Pub. L. 106–178), the U.S. Government determined on December 20, 2004, that the measures authorized in Section 3 of the Act shall apply to the following foreign entities identified in the report submitted pursuant to Section 2(a) of the Act:

Beijing Alite Technologies Company Limited (China) and any successor, sub-unit, or subsidiary thereof;

China Aero-Technology Import Export Corporation (CATIC) (China) and any successor, sub-unit, or subsidiary thereof;

China Great Wall Industry Corporation (China) and any successor, sub-unit, or subsidiary thereof;

China North Industry Corporation (NORINCO) (China) and any successor, sub-unit, or subsidiary thereof;

Ecoma Enterprise Co. Ltd. (Taiwan) and any successor, sub-unit, or subsidiary thereof;

Paeksan Associated Corporation (North Korea) and any successor, sub-unit, or subsidiary thereof;

Q.C. Chen (China);

Wha Cheong Tai Company (aka Wah Cheong Tai Company and Hua Chang Tai Company) (China) and any successor, sub-unit, or subsidiary thereof; and

Zibo Chemet Equipment Corporation Ltd. (aka Chemet Global Ltd.) (China) and any successor, sub-unit, or subsidiary thereof.

Accordingly, pursuant to the provisions of the Act, the following measures are imposed on these entities:

1. No department or agency of the United States Government may procure, or enter into any contract for the procurement of, any goods, technology, or services from these foreign persons;

2. No department or agency of the United States Government may provide any assistance to the foreign persons, and these persons shall not be eligible to participate in any assistance program of the United States Government;

3. No United States Government sales to the foreign persons of any item on the United States Munitions List (as in effect on August 8, 1995) are permitted, and all sales to these persons of any defense articles, defense services, or design and construction services under the Arms Export Control Act are terminated; and,

4. No new individual licenses shall be granted for the transfer to these foreign persons of items the export of which is controlled under the Export Administration Act of 1979 or the Export Administration Regulations, and any existing such licenses are suspended.

These measures shall be implemented by the responsible departments and agencies of the United States Government and will remain in place for two years from the effective date, except to the extent that the Secretary of State or Deputy Secretary of State may subsequently determine otherwise. A new determination will be made in the event that circumstances change in such a manner as to warrant a change in the duration of sanctions.

In addition, it was determined on December 20, 2004, that the sanctions imposed effective September 23, 2004 (69 FR 4845), on the Spanish entity Telstar (and any successor, sub-unit, or subsidiary thereof), no longer apply.

Dated: December 27, 2004.

Vann H. Van Diepen,

Acting Assistant Secretary of State for Nonproliferation, Department of State.

[FR Doc. 04–28736 Filed 12–30–04; 8:45 am]

BILLING CODE 4710–27–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Identification of Countries Under Section 182 of the Trade Act of 1974: Request for Public Comment

AGENCY: Office of the United States Trade Representative.

ACTION: Request for written submissions from the public.

SUMMARY: Section 182 of the Trade Act of 1974 (Trade Act) (19 U.S.C. 2242), requires the United States Trade Representative (USTR) to identify countries that deny adequate and effective protection of intellectual property rights or deny fair and equitable market access to U.S. persons who rely on intellectual property protection. (Section 182 is commonly referred to as the ''Special 301'' provision of the Trade Act.) In addition, USTR is required to determine which of those countries should be identified as Priority Foreign Countries. Acts, policies, or practices that are the basis of a country's identification as a priority foreign country are normally the subject of an investigation under the Section 301 provisions of the Trade Act. Section 182 of the Trade Act contains a special rule for the identification of actions by Canada affecting United States cultural industries.

USTR requests written submissions from the public concerning foreign countries' acts, policies, and practices that are relevant to the decision whether to identify particular trading partners under Section 182 of the Trade Act.

DATES: Submissions must be received on or before 5 p.m. on Friday, February 11, 2005.

ADDRESSES: Comments should be addressed to Sybia Harrison, Special Assistant to the Section 301 Committee, and sent (i) electronically, to *FR0436@ustr.eop.gov,* with ''Special 301 Review'' in the subject line, or (ii) by fax, to (202) 395–9458, with a confirmation copy sent electronically to the e-mail address above.

FOR FURTHER INFORMATION CONTACT: Jennifer Choe, Director for Intellectual Property (202) 395–6864, Brian Peck, Senior Director for Intellectual Property (202) 395–6864, or Stanford McCoy, Assistant General Counsel (202) 395–3581, Office of the United States Trade Representative. In the event that none of the above are available, questions should then be directed to Victoria Espinel, Deputy Assistant U.S. Trade Representative for Intellectual Property, at (202) 395–6864.

SUPPLEMENTARY INFORMATION: Pursuant to Section 182 of the Trade Act, USTR must identify those countries that deny adequate and effective protection for intellectual property rights or deny fair and equitable market access to U.S. persons who rely on intellectual property protection. Those countries that have the most onerous or egregious acts, policies, or practices and whose acts, policies, or practices have the greatest adverse impact (actual or potential) on relevant U.S. products are to be identified as Priority Foreign Countries. Acts, policies, or practices that are the basis of a country's designation as a Priority Foreign Country are normally the subject of an investigation under the Section 301 provisions of the Trade Act.

USTR may not identify a country as a Priority Foreign Country if it is entering into good faith negotiations, or making significant progress in bilateral or multilateral negotiations, to provide adequate and effective protection of intellectual property rights.

USTR requests that, where relevant, submissions mention particular regions, provinces, states, or other subdivisions of a country in which an act, policy, or practice deserves special attention in this year's report. Such mention may be positive or negative, so long as it deviates from the general norm in that country. In addition, USTR is considering issuance of a further notice requesting information concerning individual businesses that have been found to have infringed intellectual property rights.

Section 182 contains a special rule regarding actions of Canada affecting United States cultural industries. The USTR must identify any act, policy, or practice of Canada that affects cultural industries, is adopted or expanded after December 17, 1992, and is actionable under Article 2106 of the North American Free Trade Agreement (NAFTA). Any act, policy, or practice so identified shall be treated the same as an act, policy, or practice that was the basis for a country's identification as a Priority Foreign Country under Section 182(a)(2) of the Trade Act, unless the United States has already taken action pursuant to Article 2106 of the NAFTA.

USTR must make the above-referenced identifications within 30 days after publication of the National Trade Estimate (NTE) report, *i.e.*, no later than April 30, 2005.

Requirements for comments: Comments should include a description of the problems experienced and the effect of the acts, policies, and practices on U.S. industry. Comments should be as detailed as possible and should provide all necessary information for assessing the effect of the acts, policies, and practices. Any comments that include quantitative loss claims should be accompanied by the methodology used in calculating such estimated losses.

Comments must be in English. No submissions will be accepted via postal service mail. Documents should be submitted as either WordPerfect, MS Word, or text (.TXT) files. Supporting documentation submitted as spreadsheets is acceptable as Quattro Pro or Excel files. A submitter requesting that information contained in a comment be treated as confidential business information must certify that such information is business confidential and would not customarily be released to the public by the submitter. A non-confidential version of the comment must also be provided. For any document containing business confidential information, the file name of the business confidential version should begin with the characters ''BC–'', and the file name of the public version should begin with the character ''P–''. The ''P–'' or ''BC–'' should be followed by the name of the submitter. Submissions should not include separate cover letters; information that might appear in a cover letter should be included in the submission itself. To the extent possible, any attachments to the submission should be included in the same file as the submission itself, and not as separate files.

All comments should be addressed to Sybia Harrison, Special Assistant to the Section 301 Committee, and sent (i) electronically, to *FR0436@ustr.eop.gov,* with ''Special 301 Review'' in the subject line, or (ii) by fax, to (202) 395–9458, with a confirmation copy sent electronically to the email address above.

Public inspection of submissions: Within one business day of receipt, non-confidential submissions will be placed in a public file open for inspection at the USTR reading room, Office of the United States Trade Representative, Annex Building, 1724 F Street, NW., Room 1, Washington, DC. An appointment to review the file must be scheduled at least 48 hours in advance and may be made by calling Jacqueline Caldwell at (202) 395–6186. The USTR reading room is open to the public from 10 a.m. to noon and from 1 p.m. to 4 p.m., Monday through Friday.

Victoria Espinel,

Acting Assistant, U.S. Trade Representative for Services, Investment, and Intellectual Property.

[FR Doc. 04–28705 Filed 12–30–04; 8:45 am]

BILLING CODE 3190–W5–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

[Docket No. WTO/DS108]

WTO Dispute Settlement Proceeding Regarding the American JOBS Creation Act of 2004

AGENCY: Office of the United States Trade Representative.

ACTION: Notice; request for comments.

SUMMARY: The Office of the United States Trade Representative (''USTR'') is providing notice that the European Communities has requested dispute settlement consultations under the Marrakesh Agreement Establishing the World Trade Organization (''WTO Agreement''). That request may be found at *http://www.wto.org* contained in a document designated as WT/DS108/27. USTR invites written comments from the public concerning the issues raised in this dispute.

DATES: Although USTR will accept any comments received during the course of the dispute settlement proceedings, comments should be submitted on or before January 10, 2005, to be assured of timely consideration by USTR.

ADDRESSES: Comments should be submitted (i) electronically, to *FR0503@ustr.eop.gov,* Attn: ''JOBS Act (DS108)'' in the subject line, or (ii) by fax, to Sandy McKinzy, at 202–395–3640. For documents sent by fax, USTR requests that the submitter provide a confirmation copy to the electronic mail address listed above.

FOR FURTHER INFORMATION CONTACT: William D. Hunter, Associate General Counsel, Office of the United States Trade Representative, 600 17th Street, NW., Washington, DC 20508, (202) 395–3582.

SUPPLEMENTARY INFORMATION: Section 127(b) of the Uruguay Round Agreements Act (''URAA'') (19 U.S.C. 3537(b)(1)) requires that notice and opportunity for comment be provided after the United States submits or receives a request for the establishment of a WTO dispute settlement panel. Consistent with this obligation, but in an effort to provide additional opportunity for comment, USTR is providing notice that consultations have been requested pursuant to the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (''DSU''). If such consultations should fail to resolve the matter and a dispute settlement panel is established pursuant to the DSU, such panel, which would hold its meetings in Geneva, Switzerland, would be expected to issue a report on its findings and recommendations within 90 days after referral of the matter to it.

Major Issues Raised by the EC

On November 5, 2004, the EC requested consultations with the United States pursuant to Articles 4 and 21.5 of the DSU, Article 4 of the Agreement on Subsidies and Countervailing Measures (''SCM Agreement''), Article 19 of the Agreement on Agriculture, and Article XXII:1 of the General Agreement on Tariffs and Trade 1994 (''GATT 1994'') with respect to the American JOBS Creation Act of 2004 (''the JOBS Act''). According to the EC, the JOBS Act, which was enacted on October 22, 2004, was intended to implement the recommendations and rulings of the WTO Dispute Settlement Body in case WT/DS108 (United States—Tax Treatment for ''Foreign Sales Corporations'' and United States—Tax Treatment for ''Foreign Sales Corporations''—Recourse to Article 21.5 of the DSU by the European Communities), but fails to do so properly and is inconsistent with the same provisions of the WTO Agreement as was the predecessor legislation.

In particular, the EC considers that Section 101 of the JOBS Act contains transitional provisions that will allow U.S. exporters to continue to benefit from the FSC Replacement and Extraterritorial Income Exclusion Act as follows: (a) In the years 2005 and 2006 with respect to all export transactions; and (b) for an indefinite period with respect to certain binding contracts. According to the EC, this results in a failure to withdraw the subsidy and implement the DSB's recommendations and rulings. The EC considers that the United States has failed to withdraw the subsidies as required by Article 4.7 of the SCM Agreement and has failed to implement the DSB's recommendations and rulings as required by Articles 19.1 and 21.1 of the DSU. The EC also considers that the United States continues to violate Articles 3.1(a) and 3.2 of the SCM Agreement, Articles 10.1 and 8 of the Agreement on Agriculture and Article III:4 of the GATT 1994.

Public Comment: Requirements for Submissions

Interested persons are invited to submit written comments concerning the issues raised in this dispute. Persons may submit their comments either (i) electronically, to *FR0503@ustr.eop.gov,* Attn: ''JOBS Act (DS108)'' in the subject line, or (ii) by fax to Sandy McKinzy, at 202–395–3640. For documents sent by fax, USTR requests that the submitter provide a confirmation copy to the electronic mail address listed above.

USTR encourages the submission of documents in Adobe PDF format, as attachments to an electronic mail. Interested persons who make submissions by electronic mail should not provide separate cover letters; information that might appear in a cover letter should be included in the submission itself. Similarly, to the extent possible, any attachments to the submission should be included in the same file as the submission itself, and not as separate files.

Comments must be in English. A person requesting that information contained in a comment submitted by that person be treated as confidential business information must certify that such information is business confidential and would not customarily be released to the public by the submitter. Confidential business information must be clearly designated as such and the submission must be marked ''BUSINESS CONFIDENTIAL'' at the top and bottom of the cover page and each succeeding page.

Information or advice contained in a comment submitted, other than business confidential information, may be determined by USTR to be confidential in accordance with section 135(g)(2) of the Trade Act of 1974 (19 U.S.C. 2155(g)(2)). If the submitter believes that information or advice may qualify as such, the submitter—

(1) Must clearly so designate the information or advice;

(2) Must clearly mark the material as ''SUBMITTED IN CONFIDENCE'' at the top and bottom of the cover page and each succeeding page; and

(3) Is encouraged to provide a non-confidential summary of the information or advice.

Pursuant to section 127(e) of the URAA (19 U.S.C. 3537(e)), USTR will maintain a file on this dispute settlement proceeding, accessible to the public, in the USTR Reading Room, which is located at 1724 F Street, NW., Washington, DC 20508. The public file will include non-confidential comments received by USTR from the public with respect to the dispute; if a dispute settlement panel is convened, the U.S. submissions to that panel, the submissions, or non-confidential summaries of submissions, to the panel received from other participants in the dispute, as well as the report of the panel; and, if applicable, the report of the Appellate Body. An appointment to review the public file (Docket WTO/DS108, JOBS Act dispute) may be made by calling the USTR Reading Room at (202) 395–6186. The USTR Reading Room is open to the public from 9:30

a.m. to noon and 1 p.m. to 4 p.m., Monday through Friday.

Bruce R. Hirsh,

Acting Assistant United States Trade Representative for Monitoring and Enforcement.

[FR Doc. 04–28673 Filed 12–30–04; 8:45 am]

BILLING CODE 3190–W5–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

[Docket No. WTO/DS319]

WTO Dispute Settlement Proceeding Regarding Section 776 of the Tariff Act of 1930 and Antidumping Duty Investigation on Stainless Steel Bar From the United Kingdom

AGENCY: Office of the United States Trade Representative.

ACTION: Notice; request for comments.

SUMMARY: The Office of the United States Trade Representative (''USTR'') is providing notice that the European Communities (''EC'') has requested dispute settlement consultations under the Marrakesh Agreement Establishing the World Trade Organization (''WTO Agreement'') regarding the U.S. antidumping duty (''AD'') investigation on stainless steel bar from the United Kingdom. That request may be found at *http://www.wto.org* contained in a document designated as WT/DS319/1. USTR invites written comments from the public concerning the issues raised in this dispute.

DATES: Although USTR will accept any comments received during the course of the dispute settlement proceedings, comments should be submitted on or before January 10, 2005, to be assured of timely consideration by USTR.

ADDRESSES: Comments should be submitted (i) electronically, to *FR0516@ustr.eop.gov,* with ''Attn: UK Steel Bar (DS319)'' in the subject line, or (ii) by fax, to Sandy McKinzy at (202) 395–3640. For documents sent by fax, USTR requests that the submitter provide a confirmation copy to the electronic mail address listed above.

FOR FURTHER INFORMATION CONTACT: Amy A. Karpel, Assistant General Counsel, Office of the United States Trade Representative, 600 17th Street, NW., Washington, DC 20508, (202) 395–3150.

SUPPLEMENTARY INFORMATION: Section 127(b) of the Uruguay Round Agreements Act (''URAA'') (19 U.S.C. 3537(b)(1)) requires that notice and opportunity for comment be provided after the United States submits or receives a request for the establishment of a WTO dispute settlement panel. Consistent with this obligation, but in an effort to provide additional opportunity for comment, USTR is providing notice that consultations have been requested pursuant to the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (''DSU''). If such consultations should fail to resolve the matter and a dispute settlement panel is established pursuant to the DSU, such panel, which would hold its meetings in Geneva, Switzerland, would be expected to issue a report on its findings and recommendations within six to nine months after it is established.

Major Issues Raised by the EC

On November 5, 2004, the EC requested consultations with the United States pursuant to Article 4 the DSU, Article XXII:1 of the General Agreement on Tariffs and Trade 1994 (''GATT 1994''), and Article 17 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the ''ADA'') with respect to Section 776 of the Tariff Act of 1930, as amended, determinations of dumping by the U.S. Department of Commerce (''DOC'') with respect to Firth Rixson Special Steels Limited (FRSS), 67 FR 3146 (January 23, 2002), and the imposition of an antidumping duty order by the DOC with respect to FRSS with dumping margins of 125.77%, 67 FR 10381 (March 7, 2002). The EC asserts that the DOC refused to verify data submitted by FRSS and rejected such data for the determination of the margin of dumping for FRSS, decided to employ an ''adverse inference'' in the selection of facts available with respect to FRSS, and relied on information contained in the complaint for the establishment of the margin of dumping and antidumping duty for FRSS. According to the EC, the DOC determinations in this investigation and Section 776 of the Tariff Act of 1930 are inconsistent with Articles 1, 6, and 18.4 and Annex II of the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (''AD Agreement''), Article VI of the General Agreement on Tariffs and Trade 1994 (''GATT 1994'') and Article XVI:4 of the WTO Agreement.

Public Comment: Requirements for Submissions

Interested persons are invited to submit written comments concerning the issues raised in this dispute. Persons may submit their comments either (i) electronically to *FR0516@ustr.eop.gov,* with ''Attn: UK Steel Bar (DS319)'' in the subject line, or (ii) by fax, to Sandy McKinzy at (202) 395–3640. For documents sent by fax, USTR requests that the submitter provide a confirmation copy to the electronic mail address listed above. USTR encourages the submission of documents in Adobe PDF format, as attachments to an electronic mail. Interested persons who make submissions by electronic mail should not provide separate cover letters; information that might appear in a cover letter should be included in the submission itself. Similarly, to the extent possible, any attachments to the submission should be included in the same file as the submission itself, and not as separate files.

A person requesting that information contained in a comment submitted by that person be treated as confidential business information must certify that such information is business confidential and would not customarily be released to the public by the submitter. Confidential business information must be clearly designated as such and the submission must be marked ''BUSINESS CONFIDENTIAL'' at the top and bottom of the cover page and each succeeding page.

Information or advice contained in a comment submitted, other than business confidential information, may be determined by USTR to be confidential in accordance with section 135(g)(2) of the Trade Act of 1974 (19 U.S.C. 2155(g)(2)). If the submitter believes that information or advice may qualify as such, the submitter—

(1) Must clearly so designate the information or advice;

(2) Must clearly mark the material as ''SUBMITTED IN CONFIDENCE'' at the top and bottom of the cover page and each succeeding page of the submission; and

(3) Is encouraged to provide a non-confidential summary of the information or advice.

Pursuant to section 127(e) of the URAA (19 U.S.C. 3537(e)), USTR will maintain a file on this dispute settlement proceeding, accessible to the public, in the USTR Reading Room, which is located at 1724 F Street, NW., Washington, DC 20508. The public file will include non-confidential comments received by USTR from the public with respect to the dispute; if a dispute settlement panel is convened, the U.S. submissions to that panel, the submissions, or non-confidential summaries of submissions, to the panel received from other participants in the dispute, as well as the report of the panel; and, if applicable, the report of the Appellate Body. An appointment to review the public file (Docket No. WT/DS319, UK Steel Bar), may be made by

calling the USTR Reading Room at (202) 395–6186. The USTR Reading Room is open to the public from 9:30 a.m. to noon and 1 p.m. to 4 p.m., Monday through Friday.

Bruce R. Hirsh,

Acting Assistant United States Trade Representative for Monitoring and Enforcement.

[FR Doc. 04–28674 Filed 12–30–04; 8:45 am]

BILLING CODE 3190–W5–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Notice of Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits Filed Under Subpart B (Formerly Subpart Q) during the Week Ending December 3, 2004

The following Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits were filed under Subpart B (formerly Subpart Q) of the Department of Transportation's Procedural Regulations (See 14 CFR 301.201 *et seq.*). The due date for Answers, Conforming Applications, or Motions to Modify Scope are set forth below for each application. Following the Answer period DOT may process the application by expedited procedures. Such procedures may consist of the adoption of a show-cause order, a tentative order, or in appropriate cases a final order without further proceedings.

Docket Number: OST–1999–5868.
Date Filed: November 30, 2004.
Due Date for Answers, Conforming Applications, or Motion to Modify Scope: December 21, 2004.
Description: Application of Continental Airlines, Inc. requesting renewal of its active Route 561 U.S.-Mexico certificate authority and to amend Route 561 to award Continental authority to engage in scheduled air transportation of persons, property and mail between Houston and Manzanillo and Morelia and between New York/Newark and Acapulco, Puerto Vallarta and San Jose del Cabo.

Docket Number: OST–1999–6275.
Date Filed: November 30, 2004.
Due Date for Answers, Conforming Applications, or Motion to Modify Scope: December 21, 2004.
Description: Application of Delta Air Lines, Inc. requesting renewal and amendment of its certificate of public convenience and necessity for Route 562, authorizing Delta to continue to engage in scheduled foreign air transportation of persons, property, and mail on the U.S. Mexico routes.

Docket Number: OST–1999–6319.
Date Filed: November 30, 2004.
Due Date for Answers, Conforming Applications, or Motion to Modify Scope: December 21, 2004.
Description: Application of Northwest Airlines, Inc., requesting renewal of its experimental certificate of public convenience and necessity for Route 564 (U.S.–Mexico), and amendment of its Route 564 certificate authority to include U.S.–Mexico city-pairs Northwest currently is authorized to serve under exemption authority. Northwest also asks for renewed authority to integrate Route 564 certificate authority with its existing certificate and exemption authority.

Docket Number: OST–1999–6276.
Date Filed: December 1, 2004.
Due Date for Answers, Conforming Applications, or Motion to Modify Scope: December 22, 2004.
Description: Application of Alaska Airlines, Inc. requesting renewal of its certificate of public convenience and necessity for Route 559 permitting Alaska to engage in scheduled foreign air transportation of persons, property and mail on the United States-Mexico routes. Alaska Airlines, Inc. also requests amendment of its certificate to include various routes held by Alaska currently through exemption authority.

Docket Number: OST–1999–6671.
Date Filed: December 1, 2004.
Due Date for Answers, Conforming Applications, or Motion to Modify Scope: December 22, 2004.
Description: Application of ATA Airlines, Inc., requesting renewal and amendment of its certificate of public convenience and necessity for Route 653 permitting ATA to continue to engage in scheduled foreign air transportation of persons, property, and mail between Indianapolis, IN and Cancun, Mexico. ATA also request that its certificate be amended and reissued in the name of ATA Airlines, Inc.

Renee Wright,

Supervisory Dockets Officer, Alternate Federal Register Liaison.

[FR Doc. 04–28010 Filed 12–30–04; 8:45 am]

BILLING CODE 4910–62–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Environmental Impact Statement: Municipality of Anchorage & Matanuska-Susitna Borough, AK

AGENCY: Federal Highway Administration (FHWA), Alaska Department of Transportation and Public Facilities (ADOT&PF).

ACTION: Notice of intent.

SUMMARY: The FHWA is issuing this notice to advise the public that an environmental impact statement (EIS) will be prepared for a proposed bridge across Knik Arm between the Municipality of Anchorage (MOA) and the Matanuska-Susitna (MatSu) Borough in Alaska. Scoping meetings for the proposed Knik Arm Crossing project will be held in Anchorage and Wasilla, Alaska during the Winter/Spring of 2005.

FOR FURTHER INFORMATION CONTACT: Edrie Vinson, Environmental Project Manager, Federal Highway Administration, P.O. Box 21648, Juneau, Alaska 99802, (907) 586–7464, or Henry Springer, Project Manager, Alaska Department of Transportation and Public Facilities, 550 West Seventh Avenue, Suite 1850, Anchorage, Alaska 99501, (907) 269–6698.

SUPPLEMENTARY INFORMATION: The FHWA, in cooperation with the Alaska Department of Transportation and Public Facilities (ADOT&PF) and the Knik Arm Bridge and Toll Authority (KABATA), will prepare an EIS for a proposed cost affordable, vehicular toll bridge across the Knik Arm between the MOA and Mat-Su connecting the Port of Anchorage area and existing access roads in the MOA with the Port MacKenzie area and existing access road in the Mat-Su. The proposed bridge is considered necessary to improve transportation network connectivity efficiently linking the two ports' operations and infrastructure, support military logistics and deployment, provide an alternate north-south emergency response and disaster evacuation route, establish transportation infrastructure for existing and projected population and economic growth, and to implement the Alaska legislative mandate to construct the Knik Arm bridge.

A reasonable range of alternatives has yet to be developed for the proposed project but will include various crossing types and design variations. All proposed bridge-crossing alternatives will meet the reasonable needs of navigation for Knik Arm. The No-Build alternative will remain a viable alternative throughout the EIS process.

Letters describing the proposed action and soliciting comments will be sent to appropriate Federal, State and local agencies, and to private organizations and citizens who have previously expressed or are known to have interest in the proposal. Formal agency scoping

meetings will be held during the Winter/Spring of 2005. A series of additional agency and public meetings will be held in Anchorage and Wasilla, Alaska throughout the EIS study process. In addition, formal public hearings will be held on the Draft Environmental Impact Statement (DEIS). Public notice will be given of the time and place of the meetings and hearings. The new DEIS will be made available for public and agency review and comment prior to the formal public hearings.

To ensure that the full range of issues related to this proposed action are addressed and all significant issues identified, comments, and suggestions are invited from all interested parties. Comments concerning this proposed action and the EIS should be directed to Henry Springer, Alaska Department of Transportation and Public Facilities Project Manager, 550 West Seventh Avenue, Suite 1850, Anchorage, Alaska 99501, (907) 269–6698.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Research, Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities to apply to this program)

Issued on December 21, 2004.

David C. Miller,

Division Administrator, Juneau, Alaska.

[FR Doc. 04–28644 Filed 12–30–04; 8:45 am]

BILLING CODE 4910–22–M

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

Reports, Forms and Record Keeping Requirements; Agency Information Collection Activity Under OMB Review

AGENCY: National Highway Traffic Safety Administration, DOT.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and comment. The ICR describes the nature of the information collections and their expected burden. The **Federal Register** notice with a 60-day comment period was published on Monday, October 18, 2004, FR Doc. 04–23253.

DATES: Comments must be submitted on or before February 2, 2005.

FOR FURTHER INFORMATION CONTACT: Dennis M. Flemons at the National Highway Traffic Safety Administration, National Center for Statistics and Analysis (NPO 112), (202) 366–5389, 400 Seventh Street, SW., Room #6213 Washington, DC 20590.

SUPPLEMENTARY INFORMATION:

National Highway Traffic Safety Administration

Title: Fatal Accident Reporting System (FARS).

OMB Number: 2127–0006.

Type of Request: Extension of currently approved collection.

Abstract: Under both the Highway Safety Act of 1966 and the National Traffic and Motor Vehicle Safety Act of 1966, the National Highway Traffic Safety Administration (NHTSA) has the responsibility to collect accident data that support the establishment and enforcement of motor vehicle regulations and highway safety programs. These regulations and programs are developed to reduce the severity of injury and the property damage associated with motor vehicle accidents. The Fatal Accident Reporting System (FARS) is a major system that acquires national fatality information directly from existing State files and documents. Since FARS is an on-going data acquisition system, reviews are conducted yearly to determine whether the data acquired are responsive to the total user population needs. The total user population includes Federal and State agencies and the private sector. Annual changes in the forms are minor in terms of operation and method of data acquisition, and do not affect the reporting burden of the respondent (State employees utilize existing State accident files). The changes usually involve clarification adjustments to aid statisticians in conducting more precise analyses and to remove potential ambiguity for the respondents.

Affected Public: State, local or tribal government.

Estimated Total Annual Burden: 82,364 hours.

ADDRESSES: Send comments, within 30 days, to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725–17th Street, NW., Washington, DC 20503, Attention NHTSA Desk Officer.

Comments are invited on: Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Departments estimate of the burden of the proposed information collection; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology. A comment to OMB is most effective if OMB receives it within 30 days of publication.

Issued in Washington, DC, on December 17, 2004.

Joseph S. Carra,

Associate Administrator for National Center for Statistics and Analysis.

[FR Doc. 04–28677 Filed 12–30–04; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

December 20, 2004.

The Department of the Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 11000, 1750 Pennsylvania Avenue, NW., Washington, DC 20220.

Dates: Written comments should be received on or before February 2, 2005, to be assured of consideration.

Internal Revenue Service (IRS)

OMB Number: 1545–1351.

Form Number: None.

Type of Review: Extension.

Title: SOI Corporate Survey.

Description: This is a request to conduct a yearly survey on a small portion of the very largest U.S. corporations. The data will be used to improve the quality of the Statistics of Income's (SOI) advance tax data. The survey will allow SOI to collect existing tax information earlier than regular IRS processing currently allows. Advance tax data have been requested by the Bureau of Economic Analysis in the Department of Commerce, the Office of Tax Analysis in the Department of the Treasury, and the Joint Committee on Taxation for tax analysis purposes.

Respondents: Business or other for-profit.

Estimated Number of Respondents: 175.

Estimated Burden Hours Respondent: 30 minutes.

Frequency of response: Annually.

Estimated Total Reporting Burden: 88 hours.

Clearance Officer: R. Joseph Durbala, (202) 622–3634, Internal Revenue Service, Room 6516, 1111 Constitution Avenue, NW., Washington, DC 20224.

OMB Reviewer: Joseph F. Lackey, Jr., (202) 395–7316, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503.

Lois K. Holland,

Treasury PRA Clearance Officer.

[FR Doc. 04–28695 Filed 12–30–04; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

December 22, 2004.

The Department of the Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 11000, 1750 Pennsylvania Avenue, NW., Washington, DC 20220.

DATES: Written comments should be received on or before February 2, 2005 to be assured of consideration.

Internal Revenue Service (IRS)

OMB Number: 1545–0200.

Form Number: IRS Form 5307.

Type of Review: Revision.

Title: Application for Determination for Adopters of Master or Prototype or Volume Submitter Plans.

Description: This form is filed by employers or plan administrators who have adopted a master or prototype plan approved by the IRS National Office or a regional prototype plan approved by the IRS District Director to obtain a ruling that the plan adopted is qualified under Internal Revenue Code (IRS) sections 401(a) and 501(a). It may not be used to request a letter for a multiple employer plan.

Respondents: Business or other for-profit.

Estimated Number of Respondents/ Recordkeepers: 100,000.

Estimated Burden Hours Respondent/ Recordkeeper:

	Form 5307	Schedule Q (Form 5300)
Recordkeeping	28 hr., 13 min	6 hr., 13 min.
Learning about the law or the form	7 hr., 28 min	9 hr., 14 min.
Preparing the form	13 hr., 51 min	9 hr., 45 min.
Copying, assembling, and sending the form to the IRS	1 hr., 36 min.	

Frequency of response: On occasion.

Estimated Total Reporting/ Recordkeeping Burden: 5,115,000 hours.

OMB Number: 1545–0229.

Form Number: IRS Form 6406.

Type of Review: Extension.

Title: Short Form Application for Determination for Minor Amendment of Employee Benefit Plan.

Description: This form is used by certain employee plans who want a determination letter or an amendment to the plan. The information gathered will be used to decide whether the plan is qualified under section 401(a).

Respondents: Business or other for-profit.

Estimated Number of Respondents/ Recordkeepers: 25,000.

Estimated Burden Hours Respondent/ Recordkeeper:

Recordkeeping—14 hr., 21 min.

Learning about the law or the form—2 hr., 13 min.

Preparing the form—4 hr., 25 min.

Copying, assembling, and sending the form to the IRS—

Frequency of response: On occasion.

Estimated Total Reporting/ Recordkeeping Burden: 538,250 hours.

OMB Number: 1545–1471.

Regulation Project Number: REG–209626–93 Final.

Type of Review: Extension.

Title: Notice, Consent, and Election Requirements under Sections 411(a)(11) and 417.

Description: These regulations concern the ability to make a distribution from a qualified plan within 30 days of giving the participant a written explanation of the distribution options provided the plan administrator informs the participant of the right to have at least 30 days to consider the options.

Respondents: Business or other for-profit, Individuals or households, not-for-profit institutions, Federal Government, State, Local or Tribal Government.

Estimated Number of Respondents: 750,000.

Estimated Burden Hours Respondent: 7 minutes.

Frequency of response: Other (once a year).

Estimated Total Reporting Burden: 8,333 hours.

OMB Number: 1545–1637.

Regulation Project Number: REG–106177–98.

Type of Review: Extension.

Title: Adequate Disclosure of Gifts.

Description: The information requested in regulation section 301.6501©–1(f)(2) that must be provided on a gift tax return is necessary to give the IRS a complete and accurate description of the transfer in order to begin the running of the statute of limitations on the gift. Prior to the expiration of the statute of limitations, a gift tax may be assessed and the value may be adjusted in order to determine the value of prior taxable gifts for estate and gift tax purposes.

Respondents: Individuals or households.

Estimated Number of Respondents: 1.

Estimated Burden Hours Respondent: 1 hour.

Frequency of response: On occasion.

Estimated Total Reporting Burden: 1 hour.

Clearance Officer: R. Joseph Durbala (202) 622–3634, Internal Revenue Service, Room 6516, 1111 Constitution Avenue, NW., Washington, DC 20224.

OMB Reviewer: Joseph F. Lackey, Jr. (202) 395–7316, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503.

Lois K. Holland,

Treasury PRA Clearance Officer.

[FR Doc. 04–28696 Filed 12–30–04; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

December 23, 2004.

The Department of the Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 11000, 1750 Pennsylvania Avenue, NW., Washington, DC 20220.

DATES: Written comments should be received on or before February 2, 2005 to be assured of consideration.

Internal Revenue Service (IRS)

OMB Number: 1545–1462.

Regulation Project Number: PS–268–82 Final.

Type of Review: Extension.

Title: Definitions under Subchapter S of the Internal Revenue Code.

Description: The regulations provide definitions and special rules under Code section 1377 which affect S corporations and their shareholders.

Respondents: Business or other for-profit, Individuals or households.

Estimated Number of Respondents: 4,000.

Estimated Burden Hours Respondent: 15 minutes.

Frequency of response: On occasion, Other (once).

Estimated Total Reporting Burden: 1,000 hours.

OMB Number: 1545–1612.

Regulation Project Number: REG–209830–96 Final.

Type of Review: Extension.

Title: Estate and Gift Tax Marital Deduction.

Description: The information requested in regulation section 20.2056(b)–7(d)(3)(ii) is necessary to provide a method for estates of decedents whose estate tax returns were due on or before February 18, 1997, to obtain an extension of time to make the qualified terminable interest property (QTIP) election under section 2056(b)(7)(B)(v).

Respondents: Individuals or households.

Estimated Number of Respondents: 1.

Estimated Burden Hours Respondent: 1 hour.

Frequency of response: Other (Once).

Estimated Total Reporting Burden: 1 hour.

OMB Number: 1545–1642.

Regulation Project Number: REG–104072–97 Final.

Type of Review: Extension.

Title: Recharacterizing Financing Arrangements Involving Fast-Pay Stock.

Description: Section 1.7701(l)–3 recharacterizes fast-pay arrangements. Certain participants in such arrangements must file a statement that includes the name of the corporation that issued the fast-pay stock, and (to the extent the filing taxpayer knows or has reason to know) the terms of the fast-pay stock, the date on which it was issued, and the names and taxpayer identification numbers of any shareholders of any class of stock that is not traded on an established securities market.

Respondents: Business or other for-profit.

Estimated Number of Respondents: 50.

Estimated Burden Hours Respondent: 1 hour.

Frequency of response: Annually.

Estimated Total Reporting Burden: 50 hours.

Clearance Officer: Paul H. Finger (202) 622–3634. Internal Revenue Service, Room 6516, 1111 Constitution Avenue, NW., Washington, DC 20224.

OMB Reviewer: Joseph F. Lackey, Jr. (202) 395–7316, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503.

Lois K. Holland,

Treasury PRA Clearance Officer.

[FR Doc. 04–28697 Filed 12–30–04; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Area 3 Taxpayer Advocacy Panel (Including the States of Florida, Georgia, Alabama, Mississippi, Louisiana, Arkansas and Tennessee and Puerto Rico)

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice.

SUMMARY: An open meeting of the Area 3 Taxpayer Advocacy Panel will be conducted (via teleconference). The Taxpayer Advocacy Panel is soliciting public comments, ideas, and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Tuesday, February 1, 2005 from 11 a.m. to 12 p.m. e.t.

FOR FURTHER INFORMATION CONTACT: Sallie Chavez at 1–888–912–1227, or 954–423–7979.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to section 10 (a) (2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Area 3 Taxpayer Advocacy Panel will be held Tuesday, February 1, 2005, from 11 a.m. to 12 p.m. e.t. via a telephone conference call. If you would like to have the TAP consider a written statement, please call 1–888–912–1227 or 954–423–7979, or write Sallie Chavez, TAP Office, 1000 South Pine Island Rd., Suite 340, Plantation, FL 33324. Due to limited conference lines, notification of intent to participate in the telephone conference call meeting must be made with Sallie Chavez. Ms. Chavez can be reached at 1–888–912–1227 or 954–423–7979, or post comments to the Web site: *http://www.improveirs.org/.*

The agenda will include: Various IRS issues.

Dated: December 28, 2004.

Martha J. Curry,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. 04–28734 Filed 12–30–04; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Area 4 Taxpayer Advocacy Panel (Including the States of Illinois, Indiana, Kentucky, Michigan, Ohio, West Virginia, and Wisconsin)

AGENCY: Internal Revenue Service (IRS) Treasury.

ACTION: Notice.

SUMMARY: An open meeting of the Area 4 Taxpayer Advocacy Panel will be conducted (via teleconference). The Taxpayer Advocacy Panel is soliciting public comment, ideas, and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Tuesday, January 25, 2005, at 11 a.m., eastern time.

FOR FURTHER INFORMATION CONTACT: Mary Ann Delzer at 1–888–912–1227, or (414) 297–1604.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that a meeting of the Area 4 Taxpayer Advocacy Panel will be held Tuesday,

January 25, 2005, at 11 a.m., eastern time via a telephone conference call. You can submit written comments to the panel by faxing to (414) 297–1623, or by mail to Taxpayer Advocacy Panel, Stop1006MIL, 310 West Wisconsin Avenue, Milwaukee, WI 53203–2221 or you can contact us at *http://www.improveirs.org.* This meeting is not required to be open to the public, but because we are always interested in community input, we will accept public comments. Please contact Mary Ann Delzer at 1–888–912–1227 or (414) 297–1604 for dial-in information.

The agenda will include the following: Various IRS issues.

Dated: December 27, 2004.

Bernard Coston,

Director, Taxpayer Advocacy Panel.

[FR Doc. 04–28735 Filed 12–30–04; 8:45 am]

BILLING CODE 4830–01–P

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Federal Register

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FEDERAL REGISTER PAGES AND DATE, JANUARY

CFR PARTS AFFECTED DURING JANUARY

At the end of each month, the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

REMINDERS

The items in this list were editorially compiled as an aid to Federal Register users. Inclusion or exclusion from this list has no legal significance.

RULES GOING INTO EFFECT JANUARY 3, 2005

AGRICULTURE DEPARTMENT

Agricultural Marketing Service

Onions grown in—

South Texas; published 12-30-04

ENVIRONMENTAL PROTECTION AGENCY

Air pollutants, hazardous; national emission standards:

Pulp and paper industry; published 11-2-04

Air quality implementation plans; approval and promulgation; various States:

Iowa; published 11-3-04

Solid waste:

Land disposal restrictions—

Chemical Waste Management, Chemical Services, LLC; site-specific treatment standard variance for selenium waste; published 11-19-04

FEDERAL COMMUNICATIONS COMMISSION

Common carrier services:

Communications disruptions; reporting requirements; published 12-3-04

Effective date; published 12-30-04

Digital television stations; table of assignments:

Colorado; published 11-26-04

FEDERAL MARITIME COMMISSION

Ocean common carriers and marine terminal operators agreements; published 11-4-04

HOMELAND SECURITY DEPARTMENT

Coast Guard

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LIST OF PUBLIC LAWS

This is a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with "PLUS" (Public Laws Update Service) on 202–741–6043. This list is also available online at *http://www.archives.gov/federal_register/public_laws/public_laws.html*.

The text of laws is not published in the **Federal Register** but may be ordered in "slip law" (individual pamphlet) form from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone, 202–512–1808). The text will also be made available on the Internet from GPO Access at *http://www.gpoaccess.gov/plaws/index.html*. Some laws may not yet be available.

H.J. Res. 102/P.L. 108–479

Recognizing the 60th anniversary of the Battle of Peleliu and the end of Imperial Japanese control of Palau during World War II and urging the Secretary of the Interior to work to protect the historic sites of the Peleliu Battlefield National Historic Landmark and to establish commemorative programs honoring the Americans who fought there. (Dec. 21, 2004; 118 Stat. 3905)

H.R. 2457/P.L. 108–480

To authorize funds for an educational center for the Castillo de San Marcos National Monument, and for other purposes. (Dec. 23, 2004; 118 Stat. 3907)

H.R. 2619/P.L. 108–481

Kilauea Point National Wildlife Refuge Expansion Act of 2004 (Dec. 23, 2004; 118 Stat. 3910)

H.R. 3632/P.L. 108–482

Intellectual Property Protection and Courts Amendments Act of 2004 (Dec. 23, 2004; 118 Stat. 3912)

H.R. 3785/P.L. 108–483

To authorize the exchange of certain land in Everglades National Park. (Dec. 23, 2004; 118 Stat. 3919)

H.R. 3818/P.L. 108–484

Microenterprise Results and Accountability Act of 2004 (Dec. 23, 2004; 118 Stat. 3922)

H.R. 4027/P.L. 108–485

To authorize the Secretary of Commerce to make available to the University of Miami property under the administrative jurisdiction of the National Oceanic and Atmospheric Administration on Virginia Key, Florida, for use by the University for a Marine Life Science Center. (Dec. 23, 2004; 118 Stat. 3932)

H.R. 4116/P.L. 108–486

American Bald Eagle Recovery and National Emblem Commemorative Coin Act (Dec. 23, 2004; 118 Stat. 3934)

H.R. 4548/P.L. 108–487

To authorize appropriations for fiscal year 2005 for intelligence and intelligence-related activities of the United States Government, the Community Management Account, and the Central Intelligence Agency Retirement and Disability System, and for other purposes. (Dec. 23, 2004; 118 Stat. 3939)

H.R. 4569/P.L. 108–488

To provide for the development of a national plan for the control and management of Sudden Oak Death, a tree disease caused by the fungus-like pathogen Phytophthora ramorum, and for other purposes. (Dec. 23, 2004; 118 Stat. 3964)

H.R. 4657/P.L. 108–489

District of Columbia Retirement Protection Improvement Act of 2004 (Dec. 23, 2004; 118 Stat. 3966)

H.R. 5204/P.L. 108–490

To amend section 340E of the Public Health Service Act (relating to children's hospitals) to modify provisions regarding the determination of the amount of payments for indirect expenses associated with operating approved graduate medical residency training programs. (Dec. 23, 2004; 118 Stat. 3972)

H.R. 5363/P.L. 108–491

To authorize salary adjustments for Justices and judges of the United States for fiscal year 2005. (Dec. 23, 2004; 118 Stat. 3973)

H.R. 5382/P.L. 108–492

Commercial Space Launch Amendments Act of 2004 (Dec. 23, 2004; 118 Stat. 3974)

H.R. 5394/P.L. 108–493

To amend the Internal Revenue Code of 1986 to modify the taxation of arrow components. (Dec. 23, 2004; 118 Stat. 3984)

H.R. 5419/P.L. 108–494

To amend the National Telecommunications and Information Administration Organization Act to facilitate the reallocation of spectrum from governmental to commercial users; to improve, enhance, and promote the Nation's homeland security, public safety, and citizen activated emergency response capabilities through the use of enhanced 911 services, to further upgrade Public Safety Answering Point capabilities and related functions in receiving E-911 calls, and to support in the construction and operation of a ubiquitous and reliable citizen activated system; and to provide that funds received as universal service contributions under section 254 of the Communications Act of 1934 and the universal service support programs established pursuant thereto are not subject to certain provisions of title 31, United States Code, commonly known as the Antideficiency Act, for a period of time. (Dec. 23, 2004; 118 Stat. 3986)

S. 1301/P.L. 108–495

Video Voyeurism Prevention Act of 2004 (Dec. 23, 2004; 118 Stat. 3999)

S. 2657/P.L. 108–496

Federal Employee Dental and Vision Benefits Enhancement Act of 2004 (Dec. 23, 2004; 118 Stat. 4001)

S. 2781/P.L. 108–497

Comprehensive Peace in Sudan Act of 2004 (Dec. 23, 2004; 118 Stat. 4012)

S. 2856/P.L. 108–498

To limit the transfer of certain Commodity Credit Corporation funds between conservation programs for technical assistance for the programs.

(Dec. 23, 2004; 118 Stat. 4020)

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CFR CHECKLIST

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An asterisk (*) precedes each entry that has been issued since last week and which is now available for sale at the Government Printing Office.

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1, 2 (2 Reserved)	(869–052–00001–9)	9.00	[4]Jan. 1, 2004
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72–80	(869–052–00151–1)	62.00	July 1, 2004
81–85	(869–052–00152–0)	60.00	July 1, 2004
86 (86.1–86.599–99)	(869–052–00153–8)	58.00	July 1, 2004
86 (86.600–1–End)	(869–052–00154–6)	50.00	July 1, 2004
87–99	(869–052–00155–4)	60.00	July 1, 2004
100–135	(869–052–00156–2)	45.00	July 1, 2004
136–149	(869–052–00157–1)	61.00	July 1, 2004
150–189	(869–052–00158–9)	50.00	July 1, 2004
190–259	(869–052–00159–7)	39.00	July 1, 2004
260–265	(869–052–00160–1)	50.00	July 1, 2004
266–299	(869–052–00161–9)	50.00	July 1, 2004
300–399	(869–052–00162–7)	42.00	July 1, 2004
400–424	(869–052–00163–5)	56.00	[8]July 1, 2004
425–699	(869–052–00164–3)	61.00	July 1, 2004
700–789	(869–052–00165–1)	61.00	July 1, 2004
790–End	(869–052–00166–0)	61.00	July 1, 2004
41 Chapters:			
1, 1–1 to 1–10		13.00	[3]July 1, 1984
1, 1–11 to Appendix, 2 (2 Reserved)		13.00	[3]July 1, 1984
3–6		14.00	[3]July 1, 1984
7		6.00	[3]July 1, 1984
8		4.50	[3]July 1, 1984
9		13.00	[3]July 1, 1984
10–17		9.50	[3]July 1, 1984
18, Vol. I, Parts 1–5		13.00	[3]July 1, 1984
18, Vol. II, Parts 6–19		13.00	[3]July 1, 1984
18, Vol. III, Parts 20–52		13.00	[3]July 1, 1984
19–100		13.00	[3]July 1, 1984
1–100	(869–052–00167–8)	24.00	July 1, 2004
101	(869–052–00168–6)	21.00	July 1, 2004
102–200	(869–052–00169–4)	56.00	July 1, 2004
201–End	(869–052–00170–8)	24.00	July 1, 2004
42 Parts:			
1–399	(869–052–00171–6)	61.00	Oct. 1, 2004
400–429	(869–052–00172–4)	63.00	Oct. 1, 2004
430–End	(869–052–00173–2)	64.00	Oct. 1, 2004
43 Parts:			
1–999	(869–052–00174–1)	56.00	Oct. 1, 2004
1000–end	(869–050–00173–0)	62.00	Oct. 1, 2003
44	(869–052–00176–7)	50.00	Oct. 1, 2004
45 Parts:			
1–199	(869–052–00177–5)	60.00	Oct. 1, 2004
200–499	(869–052–00178–3)	34.00	Oct. 1, 2004
500–1199	(869–052–00179–1)	56.00	Oct. 1, 2004
1200–End	(869–052–00180–5)	61.00	Oct. 1, 2004
46 Parts:			
1–40	(869–052–00181–3)	46.00	Oct. 1, 2004
41–69	(869–052–00182–1)	39.00	Oct. 1, 2004
70–89	(869–052–00183–0)	14.00	Oct. 1, 2004
90–139	(869–052–00184–8)	44.00	Oct. 1, 2004
140–155	(869–052–00185–6)	25.00	Oct. 1, 2004
156–165	(869–050–00184–5)	34.00	Oct. 1, 2003
166–199	(869–050–00185–3)	46.00	Oct. 1, 2003
200–499	(869–052–00188–1)	40.00	Oct. 1, 2004
500–End	(869–052–00189–9)	25.00	Oct. 1, 2004
47 Parts:			
0–19	(869–050–00188–8)	61.00	Oct. 1, 2003
20–39	(869–050–00189–6)	45.00	Oct. 1, 2003
40–69	(869–050–00190–0)	39.00	Oct. 1, 2003
70–79	(869–050–00191–8)	61.00	Oct. 1, 2003
80–End	(869–050–00192–6)	61.00	Oct. 1, 2003
48 Chapters:			
1 (Parts 1–51)	(869–050–00193–4)	63.00	Oct. 1, 2003
1 (Parts 52–99)	(869–050–00194–2)	50.00	Oct. 1, 2003
2 (Parts 201–299)	(869–052–00197–0)	50.00	Oct. 1, 2004
3–6	(869–052–00198–8)	34.00	Oct. 1, 2004
7–14	(869–052–00199–6)	56.00	Oct. 1, 2004
15–28	(869–050–00198–5)	57.00	Oct. 1, 2003
29–End	(869–052–00201–1)	47.00	Oct. 1, 2004
49 Parts:			
1–99	(869–052–00202–0)	60.00	Oct. 1, 2004

Title	Stock Number	Price	Revision Date
100–185	(869–050–00201–9)	63.00	Oct. 1, 2003
186–199	(869–052–00204–6)	23.00	Oct. 1, 2004
200–399	(869–050–00203–5)	64.00	Oct. 1, 2003
400–599	(869–052–00206–2)	64.00	Oct. 1, 2004
600–999	(869–052–00207–1)	19.00	Oct. 1, 2004
1000–1199	(869–052–00208–9)	28.00	Oct. 1, 2004
1200–End	(869–048–00207–8)	33.00	Oct. 1, 2003
50 Parts:			
1–16	(869–052–00210–1)	11.00	Oct. 1, 2004
17.1–17.95	(869–050–00209–4)	62.00	Oct. 1, 2003
17.96–17.99(h)	(869–050–00210–8)	61.00	Oct. 1, 2003
17.99(i)–end	(869–050–00211–6)	50.00	Oct. 1, 2003
18–199	(869–050–00212–4)	42.00	Oct. 1, 2003
200–599	(869–052–00215–1)	45.00	Oct. 1, 2004
600–End	(869–050–00214–1)	61.00	Oct. 1, 2003
CFR Index and Findings Aids	(869–052–00049–3)	62.00	Jan. 1, 2004
Complete 2004 CFR set		1,342.00	2004
Microfiche CFR Edition:			
Subscription (mailed as issued)		325.00	2004
Individual copies		2.00	2004
Complete set (one-time mailing)		298.00	2003
Complete set (one-time mailing)		298.00	2002

[1] Because Title 3 is an annual compilation, this volume and all previous volumes should be retained as a permanent reference source.

[2] The July 1, 1985 edition of 32 CFR Parts 1–189 contains a note only for Parts 1–39 inclusive. For the full text of the Defense Acquisition Regulations in Parts 1–39, consult the three CFR volumes issued as of July 1, 1984, containing those parts.

[3] The July 1, 1985 edition of 41 CFR Chapters 1–100 contains a note only for Chapters 1 to 49 inclusive. For the full text of procurement regulations in Chapters 1 to 49, consult the eleven CFR volumes issued as of July 1, 1984 containing those chapters.

[4] No amendments to this volume were promulgated during the period January 1, 2003, through January 1, 2004. The CFR volume issued as of January 1, 2002 should be retained.

[5] No amendments to this volume were promulgated during the period April 1, 2000, through April 1, 2004. The CFR volume issued as of April 1, 2000 should be retained.

[6] No amendments to this volume were promulgated during the period July 1, 2000, through July 1, 2004. The CFR volume issued as of July 1, 2000 should be retained.

[7] No amendments to this volume were promulgated during the period July 1, 2002, through July 1, 2004. The CFR volume issued as of July 1, 2002 should be retained.

[8] No amendments to this volume were promulgated during the period July 1, 2003, through July 1, 2004. The CFR volume issued as of July 1, 2003 should be retained.

TABLE OF EFFECTIVE DATES AND TIME PERIODS—JANUARY 2005

This table is used by the Office of the Federal Register to compute certain dates, such as effective dates and comment deadlines, which appear in agency documents. In computing these dates, the day after publication is counted as the first day.

When a date falls on a weekend or holiday, the next Federal business day is used. (See 1 CFR 18.17)

A new table will be published in the first issue of each month.

DATE OF FR PUBLICATION	15 DAYS AFTER PUBLICATION	30 DAYS AFTER PUBLICATION	45 DAYS AFTER PUBLICATION	60 DAYS AFTER PUBLICATION	90 DAYS AFTER PUBLICATION
Jan 3	Jan 18	Feb 2	Feb 17	March 4	April 4
Jan 4	Jan 19	Feb 3	Feb 18	March 7	April 4
Jan 5	Jan 20	Feb 4	Feb 22	March 7	April 5
Jan 6	Jan 21	Feb 7	Feb 22	March 7	April 6
Jan 7	Jan 24	Feb 7	Feb 22	March 8	April 7
Jan 10	Jan 25	Feb 9	Feb 24	March 11	April 11
Jan 11	Jan 26	Feb 10	Feb 25	March 14	April 11
Jan 12	Jan 27	Feb 11	Feb 28	March 14	April 12
Jan 13	Jan 28	Feb 14	Feb 28	March 14	April 13
Jan 14	Jan 31	Feb 14	Feb 28	March 15	April 14
Jan 18	Feb 2	Feb 17	March 4	March 21	April 18
Jan 19	Feb 3	Feb 18	March 7	March 21	April 19
Jan 20	Feb 4	Feb 22	March 7	March 21	April 20
Jan 21	Feb 7	Feb 22	March 7	March 22	April 21
Jan 24	Feb 8	Feb 23	March 10	March 25	April 25
Jan 25	Feb 9	Feb 24	March 11	March 28	April 25
Jan 26	Feb 10	Feb 25	March 14	March 28	April 26
Jan 27	Feb 11	Feb 28	March 14	March 28	April 27
Jan 28	Feb 14	Feb 28	March 14	March 29	April 28
Jan 31	Feb 15	March 2	March 17	April 1	May 2